

# EXHIBIT B

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - -x  
4 LARBALL PUBLISHING COMPANY, INC. and  
5 SANDY LINZER PRODUCTIONS, INC.,

6 Plaintiffs,

7 No. 1:22-cv-01872-KPF

8 v.

9 DUA LIPA, CLARENCE COFFEE JR., SARAH  
10 HUDSON, STEPHEN KOZMENIUK, SONY MUSIC  
11 PUBLISHING (US) LLC, UNIVERSAL MUSIC  
12 CORPORATION, and WARNER RECORDS INC.,

13 Defendants.

14 - - - - -x

15 Mitchell Silberberg & Knupp, LLP  
16 437 Madison Avenue  
17 New York, New York

18 January 30, 2024  
19 10:13 a.m.

20 Video recorded DEPOSITION of Lawrence  
21 Ferrara, Ph.D., the Expert Witness in the  
22 above-entitled action, held at the above  
23 time and place, taken before Garry J.  
24 Torres, a Stenographer and Notary Public  
25 of the State of New York, pursuant to the  
Federal Rules of Civil Procedure, Notice  
and stipulations between Counsel.

\* \* \*

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APPEARANCES:

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ALSO APPEARING:

JOE RAGUSO, VIDEOGRAPHER

\* \* \*

STIPULATIONS

IT IS HEREBY STIPULATED AND AGREED, by  
and among counsel for the respective  
parties hereto, that the filing, sealing  
and certification of the within deposition  
shall be and the same are hereby waived;

IT IS FURTHER STIPULATED AND AGREED  
that all objections, except as to form of  
the question, shall be reserved to the  
time of the trial;

IT IS FURTHER STIPULATED AND AGREED  
that the within deposition may be signed  
before any Notary Public with the same  
force and effect as if signed and sworn to  
before the Court.

\* \* \*

1 THE VIDEOGRAPHER: Good morning.  
2 We're going on the record at  
3 10:13 a.m., EST, on Tuesday,  
4 January 30th, 2024. Please note that  
5 the microphones are sensitive, may  
6 pick up whispering and private  
7 conversation. Audio and video  
8 recording will continue to take place  
9 unless all parties agree to go off the  
10 record.

11 This is media unit one of the  
12 video-recorded deposition of  
13 Professor Lawrence Ferrara being taken  
14 by counsel here in the matter of  
15 Larball Publishing Company Inc. and  
16 Sandy Linzer Production Inc. v. Dua  
17 Lipa, et al., filed in the United  
18 States district court for the Southern  
19 District of New York, case Number  
20 122CV01872LPF.

21 This deposition is being held at  
22 Mitchell Silberberg and Knupp, LLP.

23 My name is Joe Raguso with  
24 Veritext. I'm the videographer. The  
25 court reporter is Garry Torres, also

1 with Veritext. I'm not authorized to  
2 administer an oath, I'm not related to  
3 any party in this action, nor am I  
4 financially interested in the outcome.

5 Counsel in the room will state  
6 an appearance and affiliation for the  
7 record followed by the court reporter  
8 swearing in the witness.

9 MR. BROWN: Good morning,  
10 everyone. Attorney Jason T. Brown for  
11 the Plaintiffs from Brown LLC. With  
12 me in the room is also Eric Sands and  
13 Zijuan Guan and, remotely, is Patrick  
14 Almondrode.

15 MS. LEPERA: Christine Lepera,  
16 Mitchell Silberberg & Knupp, counsel  
17 for the Defendant. My co-counsel will  
18 state their own appearance.

19 MR. BERKELEY: James Berkeley  
20 with Mitchell Silberberg & Knupp,  
21 co-counsel for Defendants.

22 MS. NGUYEN: Elaine Nguyen, also  
23 with MSK for Defendants.

24 MR. BROWN: Could you swear in  
25 the witness, please?

1 L A W R E N C E F E R R A R A , P H . D . ,  
2 having first been duly sworn by  
3 Garry J. Torres, the Notary  
4 Public, was examined and  
5 testified as follows:

6 EXAMINATION

7 BY MR. BROWN:

8 Q. Good morning, Dr. Ferrara.  
9 Thank you for joining us today.

10 A. Good morning.

11 Q. Thank you for not wearing a  
12 mask. I understand that sometimes you  
13 like to wear a mask, and if at any point  
14 you feel uncomfortable, we can go back to  
15 that. But it's greatly appreciated that  
16 you're unmasked for purposes of the  
17 deposition today.

18 A. Thank you.

19 Q. I have a burning question to  
20 start off with: Tell me about your dance  
21 band.

22 A. Well, in the 1970s, I formed --  
23 I had already been playing since I was 14  
24 with bands. By the time I was 16, I  
25 joined a well-established society group

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1 that played weddings and dinner dances and  
2 so forth. The other members of the group  
3 were in their 30s and early 40s. I was  
4 16. I joined a musicians union, the  
5 American Federation of Musicians, then at  
6 16.

7 By the time I was in my,  
8 certainly, mid-20s then -- maybe a little  
9 earlier -- I broke off and created my own  
10 band, the Larry Ferrara Orchestra. We  
11 then moved into a niche. So a good  
12 portion of what I -- of the -- of the  
13 clients who hired us for weddings and for  
14 dinner dances were Latin. And so for that  
15 portion of my business, instead of the  
16 Larry Ferrara Orchestra, it was La  
17 Orchestra de Larry Ferrara, and I had  
18 business cards and so forth. And we  
19 played many, many, many Latin weddings and  
20 played in well-known at the time clubs and  
21 places that had regular dances like Club  
22 España, Casa Callisia on 11th Street -- it  
23 was a huge dance place -- Centro Arenzano.  
24 There were any number of jobs, and so we  
25 played all of the usual Latin dances, you



1 know, from merengue to tango to cumbia and  
2 so forth. And so that is part of my  
3 background: 1970s, 1980s, primarily.

4 Q. And are, like, the tango,  
5 merengue -- are those styles, or what are  
6 you referring to there?

7 MS. LEPERA: Objection to form.

8 A. When I say cumbia or merengue,  
9 these are dance types. There's a  
10 particular rhythm, boom, boom, boom, boom,  
11 boom, boom, boom, boom, boom, boom, boom,  
12 boom, boom, boom, boom, boom, boom, boom,  
13 which would be a merengue; boom, boom,  
14 boom, boom, boom, boom, boom, boom, would  
15 be a tango. And so those names refer to  
16 the type of dance that would be danced to  
17 works within, you know, those dance types.

18 Q. Did the band create any music  
19 itself?

20 MS. LEPERA: Objection to form.

21 A. I was the --

22 Q. Let me strike that question.

23 I'm sorry.

24 A. Sure.

25 Q. Did the -- and I apologize if I

1 don't say the name right -- the first or  
2 second band create any of its own music?

3 A. Well, they --

4 MS. LEPERA: Same objection to  
5 form.

6 THE WITNESS: I'm sorry.

7 MS. LEPERA: No, it's okay.

8 THE WITNESS: I'll wait.

9 MS. LEPERA: Definition of  
10 creation.

11 THE WITNESS: Yeah.

12 MS. LEPERA: You can answer.

13 A. First, both bands were  
14 concomitant, that is I started the Larry  
15 Ferrara Orchestra which continued in the  
16 '70s and the '80s, and as I testified  
17 earlier, for particular clientele, to make  
18 it easier for them, many of whom primarily  
19 spoke Spanish, I also called the band La  
20 Orchestra de Larry Ferrara which is simply  
21 a translation of the Larry Ferrara  
22 Orchestra; no change. So they were  
23 concomitant. And I did not write original  
24 music for the band, but I wrote all of the  
25 arrangements for the instrumentation that

1 we had. I'd be happy to tell you what the  
2 instrumentation is if you'd like to know,  
3 but all of the arrangements -- and  
4 literally hundreds of them -- were mine in  
5 those couple of decades.

6 Q. Have you ever been involved with  
7 an arrangement that you created that was a  
8 hit?

9 MS. LEPERA: Objection to form.  
10 But you can answer.

11 A. No.

12 Q. Have you ever composed music  
13 that was a hit?

14 A. No.

15 Q. When did you first become aware  
16 of this litigation?

17 A. To the best of my recollection  
18 and through a different law firm on behalf  
19 of Defendants, in 2021.

20 Q. And I don't want to hear  
21 anything that a law firm explicitly said  
22 to you. I'm going to -- so other than  
23 from a law firm, did -- were you aware of  
24 the litigation at all?

25 A. I was only informed by the

1 previous attorney for Defendants --

2 MS. LEPERA: He's not asking you  
3 to talk about conversations with  
4 anyone other than -- he's looking for  
5 anyone other than a lawyer.

6 A. Repeat the question, please.

7 Q. Is there anyone that you  
8 discussed this case with other than  
9 counsel?

10 A. Oh, other than either of the  
11 counsels?

12 Q. Either of the counsels: Me,  
13 counsel at the table today or prior  
14 counsel?

15 A. Not that I can recollect.

16 Q. When you first became aware of  
17 the case -- strike that.

18 Did you become aware of the case  
19 at all in the media?

20 A. I don't recall.

21 Q. Do you recall one way or the  
22 other whether any media had reached out to  
23 you for any comments about the case?

24 A. I don't recall any media  
25 reaching out to me for commentary on this

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1 issue.

2 Q. Did you ever discuss this case  
3 with any of your students?

4 A. Not that I recall.

5 Q. Have you ever communicated with  
6 any of the Plaintiffs of this case?

7 A. Not that I recall.

8 Q. Do you know who Sandy Linzer is?

9 MS. LEPERA: Objection to form.  
10 You can answer.

11 A. I only know who Sandy Linzer is  
12 in connection with this litigation as a  
13 composer of "Wiggle."

14 (Whereupon, the Stenographer  
15 spoke.)

16 A. "Wiggle," W-I-G-G-L-E. You  
17 don't mind me using the shortened title?

18 Q. As long as we both agree we can  
19 use "Wiggle" and some other terms as this  
20 case and discussion progresses.

21 A. Thank you.

22 Q. Going back to my question  
23 though, you don't recall one way or the  
24 other speaking with Sandy Linzer?

25 MS. LEPERA: Ever?

1 Q. Ever.

2 A. I don't. That doesn't mean that  
3 I didn't, but I don't recall that.

4 Q. You don't recall Sandy Linzer  
5 reaching out to you directly asking if  
6 you'd like to be the expert for him in  
7 this case?

8 A. I do not recall that.

9 Q. Do you recall that you gave the  
10 advice of a different expert to use  
11 indicating that you were too busy?

12 A. I don't recall that.

13 Q. Do you have anything to dispute  
14 that that occurred?

15 A. No.

16 Q. Had you ever heard of Sandy  
17 Linzer by -- strike that.

18 Had you ever heard of Sandy  
19 Linzer by reputation before the case  
20 commenced?

21 A. I don't recall.

22 MS. LEPERA: Asked and answered.

23 A. As I said, I don't recall.

24 Q. Have you ever heard of  
25 L. Russell Brown before the case

1 commenced?

2 A. No. As far as I know, I've  
3 never heard that name before this  
4 litigation was presented.

5 Q. Did you ever hear about --  
6 strike that.

7 As you became more involved in  
8 the case, are you familiar of the works of  
9 Sandy Linzer and L. Russell Brown?

10 MS. LEPERA: Objection to form.  
11 You can answer.

12 A. As I recall, I may have listened  
13 to some of the other songs on perhaps an  
14 album of Sandy Linzer that "Wiggle" was  
15 part of. I -- this is just too many years  
16 ago, but I can't say that I did any  
17 detailed analysis of any of the other  
18 songs of Sandy Linzer.

19 Q. Were you familiar with the song  
20 "Wiggle" before this litigation?

21 A. I don't recall being familiar  
22 with it before this litigation.

23 Q. Were you familiar with the song  
24 "Don Diablo" before this litigation?

25 A. I don't recall being familiar

1 with the song "Don Diablo" before this  
2 litigation.

3 Q. Do you recall one way or the  
4 other, whether either of your bands ever  
5 played "Don Diablo"?

6 MS. LEPERA: Same objection.  
7 Asked and answered.

8 But you can answer.

9 A. I feel quite confident that we  
10 did not.

11 Q. And based upon your  
12 recollection, you never did any  
13 arrangements for "Don Diablo" then?

14 A. That is correct.

15 Q. When did you first become aware  
16 of the song "Levitating"?

17 A. I don't recall. It may have  
18 been soon after it was released. It may  
19 have been for the first time related to  
20 this matter.

21 Q. Going back to songs by the  
22 Plaintiffs, were you familiar with the  
23 song "Tie a Yellow Ribbon Around the Old  
24 Oak Tree" before this litigation?

25 A. Yes.



1 Q. Were you familiar with the song  
2 "I Believe in You and Me"?

3 A. Yes.

4 Q. And did you have any opinions  
5 about that music?

6 MS. LEPERA: Objection to form.

7 A. You'd have to clarify what you  
8 mean, "opinions."

9 Q. Did you like the music?

10 A. That's certainly on a  
11 musicological opinion, but yes, I like  
12 both of those songs.

13 Q. Were there any additional songs  
14 you listened to after this litigation  
15 started from L. Russell Brown?

16 MS. LEPERA: Objection. Asked  
17 and answered.

18 You can answer.

19 A. Not that I recall.

20 Q. How much money have you been  
21 paid for this case to date; if you know?

22 A. About \$48,000 in 2023. Going  
23 back to 2021, when I was engaged as a  
24 consultant, not a testifying witness, I  
25 don't recall any invoicing that was in

1 2021, but certainly, in 2023, 40 -- about  
2 \$48,000.

3 Q. Do you recall one way or the  
4 other when you consulted whether the case  
5 was already in litigation or it was  
6 pre-litigation?

7 A. I do not.

8 Q. Do you remember approximately  
9 when in 2021 you spoke with prior counsel.  
10 Again, overemphasizing I don't want to  
11 hear any substance of communications with  
12 counsel.

13 A. I don't recall during 2021.

14 Q. How much money overall is it --  
15 strike that.

16 How much of your income is  
17 attributable to you being an expert in the  
18 music industry?

19 MS. LEPERA: I just caution I  
20 think that, obviously, this is it not  
21 something that's relevant.

22 Percentage-wise, I think it's fine,  
23 but actual dollars, I think, is  
24 inappropriate.

25 A. It's about 60 percent.

1 Q. How many cases per year do you  
2 consult on?

3 MS. LEPERA: Filed cases?

4 Q. We can start with filed cases.

5 A. Filed cases. Well, the average  
6 would have to be about one to two; more  
7 recently, perhaps, two to three. When I  
8 say "average," over close to 30 years, one  
9 to two, more recently, perhaps, two to  
10 three of filed case. That is where there  
11 is an actual filed complaint.

12 Q. And just to clarify your  
13 remarks, two to three a year?

14 A. That's correct.

15 Q. And how many are you paid to  
16 consult on per year?

17 MS. LEPERA: Objection to form.  
18 This is over three decades or  
19 currently?

20 Q. Per year -- for the last few  
21 years?

22 A. How many am I?

23 Q. Paid to consult on.

24 A. When you say "consult," do you  
25 mean as a consultant or as a testifying

1 witness?

2 Q. As a consultant.

3 A. As a consultant. And that's  
4 pre-filing of a complaint?

5 Q. It could be pre, post, at any  
6 stage.

7 A. I can't say offhand how many  
8 pre, but I think probably, maybe, three or  
9 four that I've been paid for, but that I  
10 haven't provided a report for. You know,  
11 I may have done an initial preliminary  
12 report and had a verbal discussion of my  
13 findings or, you know -- but in terms of  
14 actually writing reports, it's difficult  
15 for me to say.

16 MS. LEPERA: I assume you just  
17 want an estimate as opposed to  
18 speculation.

19 MR. BROWN: Yeah. Estimate is  
20 fine.

21 Q. What are the most recent cases  
22 that you testified in?

23 MS. LEPERA: Objection to form.  
24 Time frame?

25 Q. Most recent.

1           A.       Well, if you look at my CV,  
2       close to the last page, I provide those  
3       for you.

4           Q.       Based on your recollection, what  
5       was the last case you testified in?

6           A.       Was a Sam Smith case. I  
7       remember Dancing with a Stranger.

8           Q.       And what sort of testimony, if  
9       any, did you provide to that case?

10           MS. LEPERA:   Objection to form.

11           A.       Can you just -- since you  
12       haven't given me my CV to look at --

13           Q.       Happy to give it to you.

14           A.       Thank you.

15           MS. LEPERA:   Yeah. It's not a  
16       memory test on that issue.

17           Q.       Let me give you something that  
18       we're going to introduce as Plaintiff's  
19       Exhibit 1?

20           MS. LEPERA:   So is this his  
21       report?

22           MR. BROWN:   This is both his  
23       report along with his CV.

24           MS. LEPERA:   Affirmative report,  
25       not the rebuttals?

1 MR. BROWN: The affirmative  
2 report.

3 MS. LEPERA: Okay. We have  
4 extra copies here. Do you mind if we  
5 just use that -- you can use that one  
6 for the witness, and then you don't  
7 have to give us extra copies. Okay.  
8 It's all right. We've prepared. And  
9 we can just obviously go through and  
10 make sure you're representing it's the  
11 accurate replication of his  
12 affirmative report.

13 MR. BROWN: I'd like to label  
14 this Plaintiff's Exhibit 1 for  
15 purposes of today's deposition.

16 (Whereupon, the Ferrara report  
17 and CV was marked as Plaintiff's  
18 Exhibit 1 for identification.)

19 Q. You can take a moment, review  
20 it. If -- there's supposed to be a copy  
21 of your report along with your CV at the  
22 back. If there's any problems, let us  
23 know. We'll go over, probably, a lot of  
24 the pages later on. Thank you for  
25 communicating that you wanted to look at

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1 it which may help, but it isn't a memory  
2 exam today so --

3 A. Yes. Please go ahead.

4 Q. Thank you.

5 Page 11 of your -- when I say  
6 "page 11," page 11 of your CV at the back.

7 A. Yes. And it goes to page 12.  
8 There are two other cases that I've given  
9 testimony for on page 12, the most recent.

10 Q. I want to understand -- well,  
11 strike that.

12 You can actually start with --  
13 on page 11, at the top of it, there's a  
14 long list of individuals. Those are all  
15 individuals you provided some sort of  
16 consulting services to I --

17 A. These are individuals whose  
18 compositions I have analyzed that have  
19 been sent to me over 30 years.

20 Q. So these individuals may not  
21 necessarily have been your clients?

22 MS. LEPERA: Objection to form.

23 A. I don't consider any party that  
24 engages my service as a client. I  
25 understand, legally, that that might be

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1 the proper term. I consider myself an  
2 independent scholar that provides opinions  
3 and analyses.

4 And so in each of these cases --  
5 in almost all cases, I was engaged through  
6 a party affiliated with -- for example,  
7 the first one on page 11 is Taylor Swift  
8 on behalf of Ed Sheeran and so forth, on  
9 behalf of Lady Gaga. So in most cases, no  
10 direct contact with those artists.

11 Q. And going to the deposition  
12 and/or trial testimony since 2016, for the  
13 Copeland v. Bieber, I'm assuming that's  
14 Justin Bieber.

15 A. That's correct.

16 Q. And which party did you  
17 represent in that -- or strike that.

18 Who did you provide testimony  
19 for?

20 A. On behalf of Defendants Bieber,  
21 et al.

22 Q. For all nine of these, how many  
23 of them were plaintiff testimony versus  
24 defense testimony?

25 MS. LEPERA: Objection to form.



1                   You can answer if you understand  
2                   the question.

3                   A.       For the nine cases listed on  
4                   pages 11 and 12 for which I provided  
5                   deposition and/or trial testimony since  
6                   2016, eight were on behalf of Defendants.  
7                   The entry Number 6, Ambrosetti, was on  
8                   behalf of plaintiff.

9                   Q.       Can you tell me a little bit  
10                  about your testimony in that case?

11                  MS. LEPERA:   Objection to form.  
12                  Vague.   Ambiguous.

13                  A.       Well, I provided a report and a  
14                  rebuttal report.   As I recall, I think  
15                  that most of my work there in that case  
16                  was in 2021, and as I recall, the  
17                  deposition that this is referring to,  
18                  Number 6 on page 11 of my CV, was in  
19                  January of 2022.   So needless to say, the  
20                  other discovery of reports and rebuttals  
21                  and so forth would have been in 2021.

22                  Q.       You testified for the plaintiff.  
23                  Do you remember what the posture of the  
24                  case was?

25                  MS. LEPERA:   Objection to form.

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1 Q. Strike that.

2 What -- do you know what the  
3 case -- was the case about infringement?

4 A. It was and Ambrosetti claimed an  
5 infringement of a hymn by Ambrosetti used  
6 in Catholic masses.

7 Q. And do you know the result of  
8 that case?

9 A. As far as I know, the district  
10 court judge has not decided on any number  
11 of -- a little dizzying, but there are any  
12 number of cross-motions. So as far as I  
13 know, there's been no decision from the  
14 district court judge on that.

15 Q. And the other case -- strike  
16 that.

17 For that case, what sort of  
18 musicological report did you provide, if  
19 anything?

20 MS. LEPERA: Objection to form.

21 A. Bringing back memory now, this  
22 is a very interesting case because I was  
23 initially hired by a different law firm.  
24 In fact, it was Loeb & Loeb here in New  
25 York City. That was in 2016. I completed

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1 a brief report for Loeb & Loeb that was  
2 perhaps six or seven, eight pages at most,  
3 and I named it -- I -- preliminary report.  
4 It was by no means an affirmative report  
5 that one would proffer or submit as per  
6 rule 26 and the rest.

7 Now, much to my surprise and  
8 chagrin, I discovered, perhaps in 2020 or  
9 in 2021, that Loeb & Loeb -- not -- I  
10 wasn't chagrined that Loeb & Loeb was no  
11 longer the attorneys, but I discovered  
12 that the new attorney proffered my  
13 preliminary report without asking me  
14 anything about it and proffered it, as an  
15 exchange, as my affirmative report. I had  
16 no CV, there was no listing of previous  
17 testimony, my fees, nothing that one would  
18 expect following rule 26 which I certainly  
19 knew. I had to decide whether I was just  
20 going to simply inform the judge or go  
21 through that preliminary report and see if  
22 it at least was consistent, you know, with  
23 what would be a -- you know, a fuller  
24 report. I decided that it could be  
25 submitted, but I wrote in my rebuttal

1 report, which is a rebuttal to the  
2 musicologist for Defendants, this  
3 information. I was very candid with the  
4 court, essentially saying what I just  
5 said, what I just testified to and that  
6 thereby, while I stand by my earlier  
7 findings, this would -- was not nearly as  
8 detailed as a report that I would normally  
9 proffer for exchange, and to the extent  
10 that certain expectations related to  
11 rule 26 were not included in the report, I  
12 included them here. So it was that --  
13 that all was part of the process.

14 Q. So the technical part of the  
15 law, but the substantive part, has there  
16 ever been a time where a court rejected  
17 your conclusions?

18 MS. LEPERA: Objection to form.  
19 There's a preface to that question,  
20 then there was a question. I'm not  
21 sure what's the question --

22 Q. Strike the preamble.

23 MS. LEPERA: Okay.

24 Q. Has there ever been a time where  
25 the court rejected your conclusions?

1           A.       I don't know what you mean by  
2       "rejected."

3           Q.       Has there ever been a time where  
4       a court has found your methodology to be  
5       unscientific?

6           A.       Not in my memory, to be  
7       unscientific, no.

8           Q.       Has there ever been a time in  
9       which the court concluded that your  
10      findings weren't dispositive and the  
11      matter needed to go to a jury?

12                   MS. LEPERA:   Objection to form.  
13                   You can answer.

14          A.       Well, to the extent that, in  
15      some instances, when my report was  
16      submitted to the court as part of a motion  
17      for summary judgement, to the extent that  
18      that motion was denied, then, indeed, the  
19      court would have found that my report or  
20      reports were not sufficient in weighing  
21      toward a granting of a motion for summary  
22      judgement.

23          Q.       For example, in the Griffin v.  
24      Sheeran case from 2023 --

25          A.       Yes.

1 Q. -- is that what happened there?

2 MS. LEPERA: Objection to form.

3 A. Yes. As I recall, that case  
4 started in 2016. I don't recall the year  
5 in which the Defendants, Warner, Sony, Ed  
6 Sheeran, et al., submitted a motion for  
7 summary judgement to Judge Stanton in the  
8 southern district of New York, but  
9 Judge Stanton did not grant that motion  
10 for summary judgement. And so it  
11 ultimately went to trial last spring.

12 Q. And at trial, Mr. Sheeran  
13 prevailed, correct?

14 A. The Defendants prevailed.

15 Q. The Defendants prevailed?

16 A. Yes.

17 Q. Your report that you proffered  
18 for summary judgement, did that have to do  
19 with building blocks?

20 MS. LEPERA: Objection to form.

21 Mischaracterizes.

22 You can answer if you understand  
23 the question.

24 A. I understand the question. I'm  
25 trying to think back. It might or it

1 might not have. I -- it's been too many  
2 years. Again, this started in 2016. To  
3 the extent a chord progression -- there  
4 were also melodies that were put at issue  
5 by the plaintiff's expert, but to the  
6 extent that the chord progression was at  
7 issue, it would not surprise me that,  
8 during an earlier report or -- and/or  
9 during my trial testimony, that I would  
10 have referred to the chord progression as  
11 a building block.

12 Q. Other than the Sheeran case, do  
13 you recall which other of these cases, if  
14 any, made it past summary judgement and  
15 went to trial -- strike that.

16 Do you recall which of these  
17 cases, if any, went past summary  
18 judgement?

19 A. Let's see. In Copeland, that  
20 was in Virginia -- as I recall, Virginia  
21 federal court, the judge granted  
22 defendant's motion for summary judgement,  
23 and in that decision, cited my analysis as  
24 part of that.

25 In Skidmore v. Led Zeppelin,

1 obviously, the judge did not grant -- I  
2 think that was Judge Klausner -- did not  
3 grant motion for summary judgement; it  
4 went to trial.

5 And in Gray v. Perry, a truly  
6 interesting case because, indeed, Judge  
7 Snyder, S-N-Y-D-E-R, did not grant  
8 defendant's motion for summary judgement,  
9 but then on the basis of trial testimony,  
10 vacated the jury decision and dismissed  
11 the case as a matter of law.

12 Of course, that Gray v. Perry,  
13 et al., was -- that decision to vacate and  
14 dismiss the case was upheld by the ninth  
15 circuit. So that would be one that went  
16 beyond the motion for summary judgement.

17 In Hall v. Swift, the district  
18 court judge in the central district in  
19 California granted defendant's motion --  
20 this is Taylor Swift -- granted  
21 defendant's motion for summary judgement;  
22 however, the ninth circuit overturned that  
23 decision and remanded it to the district  
24 court.

25 In Ambrosetti -- again, I'm not



1 aware that the district court judge has  
2 provided a decision.

3 In Brunson v. Capitol, that was  
4 interrupted. There was a motion for  
5 summary judgement. I was deposed, but it  
6 seems to me that other motions took  
7 precedence. And so now the motion for  
8 summary judgement has kind of been  
9 sidelined. So there's been no decision on  
10 the motion for summary judgement with  
11 respect to Brunson.

12 In Sound and Color, the court, I  
13 believe, is also the central district of  
14 California in Los Angeles. I was again  
15 engaged on behalf of Sam Smith, et al.  
16 The district court dismissed the case and  
17 accepted -- granted defendant's motion for  
18 summary judgement. That, I believe, is  
19 under appeal to the ninth circuit now.

20 And in Griffin v. Sheeran, I  
21 think I already testified that -- yeah,  
22 you already have that on testimony.

23 Q. You testified about Griffin v.  
24 Sheeran. How about any of these other  
25 cases? Do you recall whether or not your

1 expert report had any discussion of  
2 building blocks in there?

3 MS. LEPERA: Objection to form.

4 A. I can't say offhand. It would  
5 depend on what was at issue and to the  
6 extent that there were building blocks  
7 like the one at issue here, then it would  
8 not surprise me that I did.

9 Q. Even back in 2016, do you think  
10 you had references to building blocks in  
11 your report?

12 MS. LEPERA: Objection to form.

13 Asked and answered.

14 A. I don't recall. The crux of the  
15 expert on the other side, as I testified  
16 earlier, in Griffin was on a number of  
17 melodies, ultimately reduced to only three  
18 at trial, but more in earlier reports, and  
19 that was the crux. Clearly, the chord  
20 progression which, you know, as per Led  
21 Zeppelin en banc, is a building block and  
22 not copyrightable, would not have been at  
23 the forefront of my report; it would have  
24 been melodies -- and melodies that are not  
25 simple scales, but melodies that have much

1 more going.

2 Q. If you recall, beyond the list  
3 of these cases, when did you first start  
4 injecting the notion of building blocks  
5 into your expert reports?

6 MS. LEPERA: Objection to form.  
7 No foundation. Misrepresents.

8 You can answer if you  
9 understand.

10 A. I don't recall.

11 Q. How many times would you say  
12 you've been deposed throughout your  
13 career?

14 MS. LEPERA: An estimate, I  
15 assume, is fine.

16 Q. An estimate.

17 MS. LEPERA: No speculation.

18 Q. You can always say  
19 approximately --

20 A. Yeah, sure.

21 Q. -- and then I'll ask you --

22 A. I will say approximately two  
23 dozen times where I was actually deposed.  
24 There have been cases where I submitted a  
25 report, but my deposition was not

1 requested.

2 Q. Generally, they probably start  
3 off in a different manner than today's  
4 deposition?

5 MS. LEPERA: Objection. That is  
6 a rhetorical question, I assume.

7 MR. BROWN: He can answer.

8 A. Probably, most of the time, not  
9 asking about La Orchestra de Larry  
10 Ferrara.

11 Q. I do want to go over some other  
12 preamble information -- and that's not  
13 part of the question, but do you go by any  
14 other names?

15 A. Other than Lawrence Ferrara?

16 Q. Other than Lawrence Ferrara?

17 A. Dad, Grandpa, Professor.

18 Q. Doctor?

19 A. Doctor.

20 Q. Larry?

21 A. Family, friends.

22 Q. What emails do you use  
23 professionally?

24 A. I have two. Obviously,  
25 lawrence.ferrara@nyu.edu which is my

1 primary. I also have an email account, a  
2 Gmail account.

3 Q. What's that Gmail account that  
4 you use professionally?

5 A. lf2nyu@gmail.com.

6 Q. In your CV, you list quite an  
7 extensive amount of information. I  
8 couldn't find any peer-reviewed  
9 publications.

10 A. Peer-reviewed publications, my  
11 understanding of rule 26 is publications  
12 less than ten years ago, and so I have  
13 either peer review or book chapters  
14 somewhere, maybe 11 or 12, but they are  
15 all pre-ten-years.

16 Q. What did you write about back  
17 then?

18 MS. LEPERA: Objection to form.  
19 Are you asking about a particular  
20 peer-reviewed publication?

21 Q. Peer-reviewed publications from  
22 10, 11 years ago?

23 A. When I say -- 10, 11  
24 publications, not 10 or 11 --

25 Q. I'm sorry. Thank you.

1 A. -- years ago.

2 Essentially, matters related to  
3 scholarship and music, for example, an  
4 article in The Musical Quarterly which is  
5 a major peer-reviewed journal about music  
6 analysis, others about research in music  
7 and -- and so forth.

8 Q. Do you recall the title of that  
9 article that you just referenced about  
10 musical analysis?

11 A. Yes. "Phenomenology" -- that's  
12 pheno-meno-ology -- "Phenomenology as a  
13 Tool for Musical Analysis."

14 Q. Do you know if that article  
15 discussed building blocks at all?

16 MS. LEPERA: Objection to form.  
17 You can answer if you  
18 understand.

19 A. I would be surprised if it did.  
20 I don't think so.

21 Q. Why would you be surprised if it  
22 did?

23 A. Because it was essentially an  
24 article that was proffering a methodology  
25 for analysis.

1 Q. Did any of your other articles,  
2 to your recollection, reference building  
3 blocks?

4 MS. LEPERA: Same objection.

5 A. Yeah. Not that I recall.

6 Q. Do you know if there's any  
7 peer-reviewed articles about building  
8 blocks?

9 MS. LEPERA: Objection to form.

10 By him? By anyone on the planet?

11 Q. By anyone.

12 A. I would have to check. Let me  
13 say that my use of building blocks comes  
14 from, as I recall, some of the case law  
15 that was associated with cases in which I  
16 gave testimony. And so building blocks,  
17 for example, in Led Zeppelin, in the ninth  
18 circuit decision with respect to Gray v.  
19 Perry, et al., those decisions, as I  
20 recall, used the word "building blocks."  
21 Those decisions go back about four years.  
22 And so it would seem to me, whenever I  
23 became aware of that, I would certainly  
24 use the term, but with this very important  
25 context. And that is that my

1 understanding of a building block -- just  
2 per se, not in the music -- a building  
3 block is a basic, essential unit upon  
4 which other elements are built or created.

5 And so certainly, for as long as  
6 I've been a musicologist, I know that  
7 scales are a musical building block. I  
8 know that and have known a very long time  
9 that the Compendium on Practices in the  
10 U.S. Copyright Office lists scales as  
11 non-copyrightable material.

12 And so I would certainly have  
13 said that the use of scales for example --  
14 and only for example -- as in this case,  
15 would have been something that is  
16 commonplace, that is basic, that is  
17 fundamental. If, ten years ago or  
18 15 years ago, I didn't use the word  
19 "building block," the meaning was the  
20 same, and so that may be a reason why it  
21 hasn't been used. But I can say that that  
22 term has been used quite a bit, and I gave  
23 two instances of ninth circuit decisions  
24 that use it overtly.

25 Q. So would you say the term



1 building block originated from the legal  
2 context and not the musical context?

3 MS. LEPERA: Objection to form.  
4 Mischaracterizes.

5 You can answer.

6 A. No. The point is: As per my  
7 long testimony a moment ago, the legal  
8 context grows out of being informed by  
9 what, in the ninth circuit, is called the  
10 extrinsic analysis. So the -- not just my  
11 reports in those two cases that I just  
12 cited that use the term, but also in  
13 reports that were proffered -- Amechi  
14 reports that were proffered in both of  
15 those cases, in fact, that, to the best of  
16 my recollection, also talk about building  
17 blocks, and those were Amechi  
18 presentations that were written by  
19 musicologists.

20 Q. Does the term "building blocks"  
21 appear in any of the textbooks that you  
22 teach at university?

23 A. I would have to check. Once  
24 again, I want to make very clear for the  
25 record that the term "building block,"

1 used as a musicologist, is as I defined it  
2 and that I think any musicologist who is  
3 trained would recognize that scales,  
4 descending or ascending, are a building  
5 block in music. I -- it would be hard for  
6 me to fathom that anyone -- any  
7 musicologist would find fault with that,  
8 that basic English usage of the term  
9 "building blocks," which I defined earlier  
10 in testimony, as it would relate to a  
11 descending scale.

12 Q. Is there an objective list  
13 that's published about what consists of  
14 building blocks?

15 MS. LEPERA: Objection to form.  
16 You can answer if you  
17 understand.

18 A. I'm not aware.

19 Q. You're not aware one way other  
20 the other?

21 MS. LEPERA: Asked and answered.

22 A. To the extent that one could go  
23 to the Compendium on Practices of the  
24 United States Copyright Office. In the  
25 portion on music, the compendium names at

1 least three, what would clearly be called,  
2 building blocks that the compendium says  
3 are not copyrightable, that one cannot say  
4 they have authorship over, and they  
5 specifically list major scales, minor  
6 scales, chromatic scales. To me, that is  
7 another instance of what any musicologist  
8 knows, and that is that major scales --  
9 which would be in the case of "Wiggle" and  
10 "Don Diablo" -- or minor scales because  
11 they're different -- which would be in the  
12 case in "Levitating" -- that these  
13 two scales -- which are different in the  
14 issue at hand -- are building blocks;  
15 they're not monopolize-able, and any  
16 musicologist would say, well, of course.

17 Q. Other than scales, what else is  
18 a building block?

19 MS. LEPERA: Objection to form.

20 You can answer if you  
21 understand.

22 In music, I assume you mean.

23 Q. In music.

24 A. Thank you.

25 MS. LEPERA: Maybe we'll do some

1 architecture.

2 A. I agree that basic chord  
3 progressions are building blocks. I  
4 certainly testified to that in the Sheeran  
5 trial, that the chord progression at issue  
6 was a building block, and as I mentioned,  
7 to the best of my recollection, in the en  
8 banc decision in Led Zeppelin, the  
9 court -- in fact, the court not only so  
10 stated, but I believe the en banc court  
11 cited Swirsky, S-W-I-R-S-K-Y v. Carey --  
12 which was, what, 15 years at least,  
13 20 years before -- I think cited Swirsky  
14 by saying that chord progressions were not  
15 copyrightable, but certainly, the en banc  
16 court so stated. So I would have  
17 certainly used that term -- and I did --  
18 in the Sheeran trial.

19 Q. Going back to my question, what  
20 else besides now scales and chord  
21 progressions would be considered building  
22 blocks in music?

23 MS. LEPERA: Objection to form.  
24 You can answer in this context  
25 if you understand.

THE WITNESS: Yeah.

A. Well, for example, the three-note portion that was at issue in Newton v. Diamond, an often-cited case in the ninth circuit that went to the en banc court, James Newton, a famous jazz flutist at University of California at the time and Diamond, Michael Diamond, one of the members of Beastie Boys. I worked on behalf of the Defendants, and Judge Manela accepted and granted motion for summary judgement, cited my report. And in that report, I noted that the chord -- the composition of the sound recording which Beastie Boys digitally sampled and dually licensed -- they licensed the sound recording with the German record company that owned the master copyright. They did not seek what would be called a publishing license on the composition, and the reason is that the portion that was sampled was merely C, D-flat C, literally a half step apart, three notes. And so while back in, what, 2004, perhaps, when that case was being litigated, I might not have used the

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1 term "building block." I certainly  
2 established and, to the extent I recalled  
3 Judge Manela's decision -- and then going  
4 up to the en banc court which also cited  
5 my analysis, I called it trite and  
6 commonplace. Today, being more consonant,  
7 if you will, with more recent case law to  
8 facilitate and help a court in making its  
9 decisions, I would certainly call C,  
10 D-flat, C a musical building block that  
11 had been used in other works including in  
12 a work by a Pulitzer prize winner, as I  
13 recall.

14 Q. Scales, chord progressions,  
15 three-note sequence that you just  
16 referenced. What else would you say is a  
17 building block?

18 MS. LEPERA: Objection to form.

19 A. Well, I'm giving you concrete  
20 answers. To go beyond them on the fly  
21 would begin to border on speculation. I  
22 know that that's not my role here.

23 Q. If I were to go look for an  
24 authority to find out where is a  
25 comprehensive list of what's considered

1 building blocks in music, where would I  
2 look?

3 MS. LEPERA: Objection to form.

4 No foundation. Mischaracterizes.

5 You can answer.

6 A. I think you asked that question.  
7 You framed it almost exactly the same, and  
8 I said I'm not aware of any so-called list  
9 of building blocks. What I am aware of is  
10 decades and decades and decades of  
11 musicological analysis, none of which  
12 would contradict calling a descending  
13 scale that merely repeats notes in a flat  
14 rhythm -- and that's what's at issue  
15 here -- no one would object to the fact  
16 that that is a musical building block. It  
17 would be really quite incomprehensible to  
18 me that that would be the case.

19 So to the extent that I am  
20 not -- once again, descending scales --  
21 ascending or descending are in that  
22 compendium that we've talked about and  
23 that are part of the decision. I believe  
24 also, in Gray, they talked about a  
25 descending on white keys of a keyboard,

1 and certainly in the en banc decision,  
2 they talk about the descending chromatic  
3 scale which was at issue in Skidmore v.  
4 Led Zeppelin. So you have two decisions  
5 there that are based on musicology.  
6 They're not based on the intrinsic  
7 analysis -- they listen or test -- they  
8 were based and cited the extrinsic  
9 analysis that is: In those two cases, my  
10 analyses that were objective, that  
11 followed the expectations of the extrinsic  
12 analysis to dissect and to put back  
13 together to consider prior art and the  
14 rest. So I find nothing startling or  
15 meaningful in the fact that one cannot  
16 produce some published list of musical  
17 building blocks. In fact, what I've  
18 called musical building blocks are  
19 consistent with musicology and, as it  
20 turns out, quite consistent with recent  
21 case law.

22 Q. In your affirmative report, you  
23 define many terms, if you recall. Did you  
24 ever define the term "building blocks"?

25 A. No.



1 Q. Would a term like that, you  
2 think, appear in the Harvard Music  
3 Dictionary that you keep citing to in your  
4 affirmative report?

5 MS. LEPERA: Objection to form.

6 A. No.

7 Q. And why is that?

8 MS. LEPERA: Objection to form.

9 A. Because, once again, it almost  
10 is redundant. That is: If you were to  
11 look at the entry on scales in the  
12 Harvard -- it is -- it would be redundant  
13 because, for example -- and by way of  
14 example, if one were to look at the entry  
15 on scales in the Harvard dictionary, it  
16 would note steps -- that there are seven  
17 steps in a major scale, seven steps in a  
18 natural minor scale. Each of the steps  
19 have a particular function -- one, two,  
20 three, four, five, six, seven -- and that  
21 this is one of the basic parts of tonal  
22 music in the West for the last many  
23 centuries.

24 So -- and the same would be on  
25 key. And so what's in another musical

1 building block? Major keys. You can't  
2 possibly consider a major key to be  
3 anything other than a musical building  
4 block. Now, in the Harvard entry on keys  
5 where they say there are two main keys,  
6 major and minor, does it say this is a  
7 building block? No. That would be  
8 redundant. There are two major keys --  
9 two fundamental keys according to the  
10 entry on key in the Harvard, major and  
11 minor. Are those building blocks? Of  
12 course. Does the Harvard have to say so?  
13 I think musicologists would read that and  
14 say, of course, of course it's a building  
15 block. A major key is a building block.

16 Q. Is there a minimum amount of  
17 notes that need to be played within in a  
18 scale for it to be considered a building  
19 block?

20 MS. LEPERA: Objection to form.

21 No foundation.

22 You can answer if you  
23 understand.

24 A. No, I don't think so. I think  
25 what is at issue is essentially, the

1 manner in which -- for example, may I use  
2 this case as a paradigm example or not?

3 Q. I'd prefer to talk about  
4 something else, and we'll get back to talk  
5 about this case. Thank you for that --

6 A. Okay. So then the answer is no.

7 Q. Is there a maximum amount of  
8 notes where it would no longer be  
9 considered a building block?

10 MS. LEPERA: Objection to form.  
11 Speculation.

12 You can answer if you understand  
13 the question.

14 A. No. And for example, if a song  
15 in a major key -- two songs are in a major  
16 key, they're at issue. Does it matter how  
17 long those songs are to say the fact that  
18 they're both in major keys is a building  
19 block and would be filtered out? And so  
20 no.

21 Q. But within the context of the  
22 scales, if I were to play D, D, D, D, D  
23 20 times, vary the rhythmic value of the  
24 notes, then go down to C and play it  
25 30 times, then go down B and play it

1 50 times, would you consider that one big  
2 piece still a building block?

3 MS. LEPERA: Objection to form.

4 Did you --

5 THE WITNESS: Yeah, I do  
6 understand.

7 A. So you talked about, maybe,  
8 80 notes, and importantly, you said "and  
9 varied it." I believe you used the word  
10 "varied." So I would say, purely  
11 speculatively, it would be difficult to  
12 consider what you described as a musical  
13 building block. In fact, I don't think it  
14 could be so described. On the other hand,  
15 if you have 20 notes that are in a flat  
16 rhythm -- a flat rhythm, simply 16th notes  
17 that merely go down the major scale in  
18 "Diablo" and "Wiggle" and the minor scale  
19 in "Levitating," a difference, on  
20 different scale degrees, one would have to  
21 say that what is similar in these two  
22 works, that is a descending scale with  
23 repeated flat 16th notes in those 20  
24 notes, that is a musical building block  
25 because that simply doesn't change

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1 meaningfully a descending major scale in  
2 "Don Diablo" or a descending minor scale  
3 in "Levitating."

4 Q. If there's no minimum amount of  
5 notes that consists of a building block,  
6 aren't songs just a whole bunch of  
7 building blocks cobbled together?

8 MS. LEPERA: Objection to form.

9 A. Well, that presumption or  
10 that -- let's say the presumption under  
11 that question disregards my answer to the  
12 questions when you said, you know,  
13 20 notes but with variation and then  
14 30 notes and then 50 notes -- you know,  
15 we're now up to 80 notes and, in a song,  
16 much more. Building block for an entire  
17 song isn't the point.

18 In the case at issue, I don't  
19 say that "Don Diablo" is a building block;  
20 I say that a very small portion of the  
21 song which, in fact, is only in bars one  
22 through four of ten-bar verses in "Don  
23 Diablo" and "Wiggle" are at issue, and  
24 they, in fact, represent a musical  
25 building block. So the way in which you

1 framed and presumptions in that question  
2 are really quite far afield from the  
3 answers.

4 Q. But I'm not asking specifically  
5 about those songs. I'm asking about what  
6 your understanding of a building block is  
7 and what constitutes a building block. So  
8 my question is: Can't you just take,  
9 let's say, four notes from a song and say  
10 this a building block?

11 MS. LEPERA: Objection to form.

12 Q. Any four notes?

13 A. I would have to see what  
14 four notes you're talking about, the  
15 context, the context of the melody and so  
16 forth. So no, I can't answer that. I'd  
17 be speculating.

18 Q. If you viewed the sheet music of  
19 the song could you then say this part is a  
20 building block and this part isn't --

21 MS. LEPERA: Objection -- I'm  
22 sorry. Did you finish your question?  
23 Objection to form. Mischaracterizes.

24 You can answer the question if  
25 you understand.

1           A.       There is always the -- well, in  
2       looking at the sheet music of any whole  
3       song, if, for example, the song was in a  
4       major key and one were to isolate  
5       five notes on a scale that reads five,  
6       four, three, two, one with a flat rhythm,  
7       one could say those five notes are a  
8       musical building block. It would not  
9       necessarily tell you anything else about  
10      what came before or what came after, but  
11      the point is that, yes, one can do that.  
12      One can do that, you know, with a -- with  
13      taking out words from a paragraph in a  
14      short story to say, well, these three  
15      words were used by others and are  
16      commonplace and trite, but I don't know  
17      that that necessarily -- it certainly has  
18      nothing do with the analysis in this case.

19               MS. LEPERA: Any time that's  
20      good for a short break, I'm going to  
21      use the restroom.

22               MR. BROWN: Yeah. That's fine.  
23      I was going to ask more questions  
24      about the CV, but we can come back.

25               MS. LEPERA: Oh, yeah. Well,

1 I'm sure there's much more. Okay.

2 MR. BROWN: Let's go off the  
3 record, please.

4 THE VIDEOGRAPHER: Off the  
5 record. The time is 11:11 a.m.

6 (Whereupon, an off-the-record  
7 discussion was held.)

8 (Whereupon, a recess was taken.)

9 THE VIDEOGRAPHER: We are back  
10 on the record. The time is 11:32 a.m.

11 Q. Doctor, I remind you you're  
12 still under oath.

13 A. Thank you. Yes.

14 Q. Just like we took a break there,  
15 if at any point you need to take a break,  
16 please let me know, and we can take a  
17 break moving forward as well.

18 A. Thank you.

19 Q. We Shall Overcome Foundation,  
20 are you familiar with who they are?

21 A. I recall being engaged in an  
22 early part of a litigation. I was not  
23 engaged in the final part of that  
24 litigation.

25 Q. And you gave no testimony in



1 that case?

2 A. No, I don't believe I was  
3 deposed. No. In fact, I'm almost certain  
4 I wasn't. I provided a report, and then  
5 there was another -- there was another --  
6 the case continued forward in a different  
7 format. I don't remember exactly what the  
8 details were, but I felt that I had  
9 provided -- maybe, a different --

10 MS. LEPERA: Don't speculate.

11 THE WITNESS: Yeah.

12 A. I can reconstruct it in my mind.  
13 I was initially asked to do an analysis on  
14 the basis of some works -- of a report on  
15 some works at issue which I did, and then  
16 there was, perhaps, a new plaintiff and  
17 new issues. I was not involved with that.  
18 They had a different expert. I felt that  
19 my testimony was concluded -- that is, my  
20 report was concluded in the first part,  
21 and it really did not obtain with the  
22 respect to the second.

23 Q. I didn't finish up going through  
24 your credentials. Hopefully that will  
25 take another five, ten minutes.

1                   Your membership and professional  
2                   organizations, the American Musicological  
3                   Society, can anybody join that?

4                   A.           Essentially, people who have an  
5                   interest in musicology. That's correct.  
6                   It's most musicologists.

7                   Q.           In answer to my question, anyone  
8                   can join?

9                   A.           Yes.

10                  Q.           What about the Society For Music  
11                  Theory? Can anybody join that?

12                  A.           Probably, I would think so, but  
13                  essentially, its people who are music  
14                  theorists.

15                  Q.           The books that you listed, are  
16                  those considered peer-reviewed  
17                  publications; do you know?

18                  A.           They are.

19                               MS. LEPERA: Objection to form.  
20                               You can answer.

21                               THE WITNESS: I'm sorry.

22                  A.           They are in this sense. The  
23                  publishers, Greenwood, you know, and the  
24                  other of them for the fourth and fifth  
25                  editions, certainly, the Philosophy and

1 the Analysis of Music and the fourth and  
2 fifth editions of Research in Music,  
3 those -- those were reviewed by the  
4 publisher. For example, I am sometimes  
5 called as an external reader by scholarly  
6 book publishers to review a book that's in  
7 draft form. Sometimes asked whether they  
8 should be published -- I've certainly done  
9 that -- whether there are things that are  
10 at issue and so forth. And so in that  
11 sense, that's a peer review. It is my  
12 understanding that the fourth and fifth  
13 edition of music -- Research in Music --  
14 let me just see where that is so I state  
15 it properly.

16 MS. LEPERA: Nine.

17 THE WITNESS: Thank you.

18 A. So Guide to Research and Music  
19 Education, fourth and fifth editions, they  
20 would have been reviewed certainly by the  
21 press -- that's Rowman Littlefield -- and  
22 I don't know that Keyboard Harmony and  
23 Improv was -- well, actually, Excelsior,  
24 at the time, would have certainly also  
25 reviewed it. So they are peer reviewed.

1 Peer review is a -- you know, a generic  
2 term, but certainly books are -- as per my  
3 CV, I sit on two -- have for a very long  
4 time -- two peer-reviewed scholarly  
5 journals in music: One published by  
6 Indiana University Press, one published by  
7 University of Illinois Press. And I am  
8 part of the peer review. That is, we who  
9 are on the editorial board review any  
10 number of submitted articles for  
11 publication, and then we essentially write  
12 a review for the editor. And we basically  
13 say, this should be published, it should  
14 not be published, it should be published,  
15 but these are significant changes that  
16 need to be made. That is the peer review,  
17 and, indeed, I'm part of it, whether for  
18 publishers or in these two journals. And  
19 I also sat on other journals as well.

20 Q. So the example you just gave,  
21 that's an academic peer review you're  
22 referring to?

23 A. An academic peer review? What  
24 do you mean by "academic"?

25 Q. Is it related to academic

1 publications?

2 MS. LEPERA: Objection to form.

3 A. These are scholarly  
4 publications. I don't know that the word  
5 "academic" is necessarily --

6 Q. Did the publication of your  
7 books go through the same process that you  
8 just described?

9 MS. LEPERA: Objection to form.

10 A. My understanding is that,  
11 certainly, with Greenwood, there was a  
12 review of my book, and as I recall, there  
13 was also a review of the fourth and fifth  
14 editions of Guide to Research books. I  
15 don't again recall because this was too  
16 far back, 1986, the Keyboard Harmony, the  
17 first book, but the review that I just  
18 described in my answer, that I am part of  
19 that review. I don't know I'd call it an  
20 academic review. The point is that it is  
21 a peer review; I would be considered a  
22 peer. And when a publishing company like  
23 Greenwood or like Rowman Littlefield would  
24 send me a draft book, I would do a peer  
25 review of it and respond, as I've done now

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1 for 20 years, on major journals in music  
2 that are, again, respectfully published by  
3 Indiana University Press and University of  
4 Illinois Press.

5 Q. Minor question about the year of  
6 publication for your Guide to Research in  
7 Music Education, fifth edition: You have  
8 it here listed 2005; do you know one way  
9 or the other why Amazon lists it as 2004?

10 A. No. I have the book that says  
11 2005.

12 Q. I want to ask you about other  
13 individuals involved in this case. Before  
14 the case commenced, were you familiar with  
15 Barbara Salani?

16 A. No.

17 Q. Were you familiar with Charlie  
18 Calello?

19 A. No.

20 Q. Did have you a chance to review  
21 Mr. Calello's -- not just his report, but  
22 his CV?

23 A. Yes, attached to his report.

24 Q. Were you familiar with some of  
25 the musical -- strike that.

1                   Were you familiar with some of  
2                   the songs that he arranged and/or  
3                   produced?

4                   A.       Yes.

5                   Q.       After reviewing the list of  
6                   songs that he arranged and/or produced,  
7                   did you have an opinion about his  
8                   credentials to any extent?

9                   MS. LEPERA:   Objection to form.  
10                  You can answer if you  
11                  understand.

12                  A.       I certainly would say that he  
13                  has credentials as a producer and an  
14                  arranger.   That doesn't necessarily mean  
15                  or translate into credentials as a  
16                  musicologist doing an analysis of  
17                  two works of issue.

18                  Q.       What is a musicologist?

19                  A.       Well, first of all,  
20                  musicology -- musicology, as defined, both  
21                  in Grove Dictionary of Music and the  
22                  Harvard, is -- essentially, it is the  
23                  scholarly study of music, and so if you're  
24                  a musicologist, you are someone who is  
25                  active in the scholarly study of music.

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1 Q. Would that preclude somebody who  
2 is somebody that actively actually creates  
3 music?

4 MS. LEPERA: Objection to form.  
5 No foundation.

6 A. The creative process, of course,  
7 is not the same as the analysis of works  
8 after they've been created. There are  
9 expectations of objectivity and distance  
10 in scholarship -- and that's not just in  
11 musicologists, but across the board,  
12 whether it's in science or the social  
13 sciences, the humanities. These  
14 expectations of distance and objectivity  
15 are important. As per my rebuttal of the  
16 Calello report, I did not find that kind  
17 of scholarship and sufficient distance;  
18 rather, I found a report that was largely  
19 the work of an advocate.

20 Q. Taking Mr. Calello out of the  
21 equation, my question is: Can an  
22 individual who's not educated in the  
23 classical sense serve as a musicologist?

24 MS. LEPERA: Objection to form.  
25 Vague and ambiguous.



1 MR. BROWN: I withdraw the  
2 question.

3 Q. Can an individual who doesn't  
4 have an advanced degree in music theory  
5 serve as a musicologist?

6 MS. LEPERA: Same objection.  
7 Use of the term "serve."

8 A. Highly speculative, but the  
9 point is: Of course. Someone who does  
10 not have a Ph.D., for example, can  
11 certainly do analysis of music, and it  
12 could be very good. The proof of the  
13 pudding is in the tasting, and in  
14 Mr. Calello's report, there's a failure  
15 with respect to musicological analysis.  
16 That does not suggest at all that someone  
17 else that doesn't have, as you say, an  
18 advanced degree in music might not be more  
19 successful.

20 Q. And what about Ms. Salani?

21 MS. LEPERA: Objection to form.  
22 Can you put more words on that  
23 sentence?

24 Q. For Ms. Salani, would you  
25 consider her a musicologist?

1 A. Yes.

2 Q. Mr. Calello, would you consider  
3 him a musicologist?

4 A. It's difficult for me to say. I  
5 haven't seen the -- I haven't seen his  
6 work in the scholarship in music; whereas,  
7 in looking at Barbara Salani's background,  
8 her current work as a Ph.D. student,  
9 certainly, that would be the scholarly  
10 study of music. So I'm not saying one way  
11 or the other about Charles Calello. What  
12 I am saying is that, based on his report,  
13 there's a failure.

14 Q. Would you say -- strike that.

15 Has the quality of your reports  
16 improved over the years?

17 MS. LEPERA: Objection to form.

18 Q. Has the quality of your reported  
19 exert reports improved over the years?

20 MS. LEPERA: Same objection.

21 A. I don't know.

22 Q. Do you recall the first report  
23 you ever crafted for litigation?

24 A. Yes.

25 Q. Do you think that quality --

1 strike that.

2 Were there things that you wish  
3 you did differently in that report?

4 MS. LEPERA: Objection to form.

5 A. May I name the report?

6 Q. Sure. Name your report.

7 A. -- speculation. The report was  
8 a report that I did on behalf of defendant  
9 Andrew Lloyd Webber in Repp v. Webber, and  
10 that was ultimately a trial in the  
11 Southern District of New York in 1998. I  
12 proffered a report several years earlier,  
13 and it was used on behalf of defendants  
14 for a motion for summary judgement.  
15 Judge Kram, K-R-A-M, granted defendant's  
16 motion for summary judgement, and as I  
17 recall, cited the report. The second  
18 circuit then, on appeal, overturned,  
19 remanded, and it ultimately went to trial  
20 in 1998. That was my first report. As I  
21 recall, it was an in-depth analysis of  
22 melody, harmony, rhythm, the structure and  
23 so forth. And certainly, part of the  
24 reports in -- more so in the rebuttal; I  
25 don't remember exactly, but point is that

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1 I named the prior art that was at issue  
2 not -- and so very much like in this case,  
3 I named -- I did the analysis, named the  
4 prior art at issue -- certainly by the  
5 rebuttal report, that was all done -- and  
6 noted that, in addition to prior art that  
7 went back into public domain works, that,  
8 in fact, Andrew Lloyd Webber, in the  
9 Phantom song, "The Phantom of the Opera,"  
10 essentially copied from himself, from  
11 works in two of his earlier musicals that  
12 predated the creation of "Till You,"  
13 plaintiff's work, which is -- I think was  
14 created in 1978. And so Andrew Lloyd  
15 Webber, in Jesus Christ Superstar, 1970,  
16 and in Joseph and the Amazing Technicolor  
17 Dreamcoat, originally written in '69, a  
18 stage show -- one of the pieces was for  
19 that -- and then completed in 1975 which  
20 is the show you would see today which  
21 retained the 1969 work -- that in those  
22 two musicals, we have absolute and clear  
23 evidence -- musicological evidence that,  
24 essentially, Andrew Lloyd Webber had  
25 written and borrowed the theme at issue of

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1 "The Phantom of the Opera."

2 So essentially, that stands  
3 exactly like what I did here that is in  
4 this case, and I don't know. I haven't  
5 read it in decades, but the point is I  
6 don't know if I'd go back and change  
7 anything. It was certainly successful;  
8 defendant prevailed at trial.

9 Q. How do you determine what the  
10 prior arts are at issue?

11 MS. LEPERA: Objection to form.  
12 But you can answer.

13 A. You begin with an analysis of  
14 both works in their entirety. You then  
15 look at -- and this is essentially what I  
16 said I did in Repp v. Webber -- you then  
17 look and do analysis of, certainly,  
18 harmony, melody, rhythm, to the extent  
19 that they're at issues, lyrics with an  
20 overall structural form, and on the basis  
21 of the analysis of those individual  
22 elements, you then put the whole thing  
23 back together. It's sometimes called in  
24 the social sciences the hermeneutic  
25 circle. It's not hermeneutics, per se;

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1 that's not what we're talking about, but  
2 the hermeneutic circle mean that you start  
3 with the whole, you dissect -- which is in  
4 keeping with the extrinsic analysis -- and  
5 then you put it all back together again.

6 On that basis, I identified  
7 those elements that have similarity and  
8 those elements that are different. On  
9 that basis, I also try to answer: Do I  
10 think that there was -- that the  
11 similarities are significant from a  
12 musicological standpoint? And finally,  
13 once I have done the prior art search,  
14 based on the similarities of that -- that  
15 are existent in the two works at issue, I  
16 can then also opine as to whether I think  
17 the similarities suggest copying.

18 Q. My question was about: How do  
19 you go about doing the prior art search?

20 A. Well, that's context for doing  
21 the prior art.

22 Q. But you just said you do the  
23 prior arts -- where do you look to?

24 MS. LEPERA: Different question.

25 Okay.

1           A.           That's a different question. I  
2           understood your question: How do I decide  
3           what to look for? And that's how I  
4           decide, based on the analysis of the  
5           whole, the parts and so forth.

6                       So now we've -- I've established  
7           what to, quote/unquote, look for, and to  
8           the extent that there is a complaint, that  
9           the complaint has musicology in it and it  
10          identifies purported similarities, to the  
11          extent sometimes I don't agree with those  
12          purported similarities or the significance  
13          that's attributed to those similarities,  
14          but the point is I understand that, in  
15          order to ultimately respond, perhaps, in  
16          the form of a rebuttal, that I will also  
17          have to include in my prior art search  
18          those similarities that have been placed  
19          at issue.

20                      So with that information,  
21          whether it's as a result of my analysis or  
22          to the extent that added to that is the  
23          analysis of a musicologist or  
24          musicologists on the other side, I then go  
25          about looking for works.

1           How do I do that? There are any  
2   number of ways. First, there are thematic  
3   indices, and there is a site. It's called  
4   RISM, R, period, I, period, S, period, M,  
5   period (sic), which stands for a French  
6   title. It's in France. Apparently, it's  
7   been around for decades. It has a  
8   database of just enumerable works, and I  
9   think there's something like 50 to 60  
10   commissions around the world that -- made  
11   up of scholars that send things into RISM.  
12   And RISM then provides, in chippets --  
13   that is, the beginnings of melodies that  
14   one could look at -- in chipplet meaning  
15   the beginning of a work, not the beginning  
16   of the verse necessarily, but beginning of  
17   the work. And so the point is that if you  
18   plug in scale degrees, you will be aligned  
19   in the database.

20           Now, by simply doing scale  
21   degrees, you can put in five, four, three,  
22   two, one, and, you know, it may go in a  
23   different direction. It might be five  
24   going up to four and three going down --  
25   you know, up to two and so forth. So what



1 you plug in doesn't necessarily always  
2 come right back out, but that's one of the  
3 databases using the same kind of process.  
4 Themefinder -- I think that's .org -- is  
5 another database. Folk Song Finder is  
6 another database. And so these are all  
7 databases that one can look at.

8 I also look to -- for example,  
9 in the case of drumbeats, I have student  
10 drum method books in my library. I cited  
11 one and attached it as an exhibit, the  
12 Pain book that had, I think, about a  
13 dozen examples of four on the floor, the  
14 kick drum playing quarter beats, that is  
15 essentially the only similarity in the  
16 rhythms at issue between "Wiggle" and  
17 "Levitating" and between "Don Diablo" and  
18 "Levitating." A commonplace -- that one  
19 could call a musical building block, four  
20 on the floor, boom, boom, boom, boom.  
21 That is so commonplace and trite that it  
22 exists in disco, in house music, in rap.  
23 It's just all over the place, and it has  
24 been for decades.

25 So essentially, I -- as I did in

1 this case, I would show that, in this  
2 student method book, this rhythm is  
3 present. I've done the same with string  
4 books. I also, in this case, used the  
5 classic, the truly iconic trumpet method  
6 book Arban, A-R-B-A-N, considered by many  
7 to be the founder of modern trumpet  
8 school, a 19th-century trumpet expert who  
9 published this very important book. In  
10 fact, my son, in grade school, used Arban  
11 when he was -- and into middle school --  
12 when he was playing trumpet, and so it's  
13 just very well known. I have the Arban  
14 book at home.

15 Q. The databases that you refer to,  
16 are they public domain?

17 MS. LEPERA: Objection to form.

18 A. Most of the works in those  
19 three cites, Folk Finder -- but not all --  
20 Folk Finder, Theme -- Themefinder and  
21 RISM, most them are public domain, as I  
22 understand the term. Certainly, going  
23 back to the 19th century and, some cases,  
24 going back to the 17th century, clearly  
25 public domain. But there are some

1 instances in Folk Finder, for example,  
2 where you -- there'll be a folk song from  
3 the 1940s or '30s. In Themefinder, there  
4 may be a song from the '30's -- in the  
5 1930s or '40s which certainly could be  
6 still under copyright protection.

7 But to answer your question, I  
8 would say the majority of the compositions  
9 in those three sites tend to be public  
10 domain.

11 Q. Does it cost money to access  
12 those sites?

13 A. No, it does not.

14 Q. Are you familiar with any of the  
15 present gadgetry where you play a song,  
16 and it tells you what song that song  
17 sounds like?

18 MS. LEPERA: Objection to form.  
19 Vague. Ambiguous.

20 A. I'm aware that they exist, but I  
21 must say that I haven't used them.

22 Q. Is there any reason that if you  
23 hum the melody to "Levitating" into Google  
24 Voice, it'll indicate it also sounds like  
25 "Don Diablo"?

1 MS. LEPERA: Objection to form.

2 No foundation.

3 You can answer if you understand  
4 the question.

5 A. Well, first of all, your  
6 question is much too broad because if I  
7 were to sing the melody to other parts of  
8 the verse in "Don Diablo" --

9 Q. Let me withdraw the question --

10 A. Thank you.

11 Q. -- and much tighter.

12 We can both agree that there's a  
13 phrase at issue here, correct?

14 A. Yes.

15 Q. If I were to hum the part of the  
16 phrase at issue to Google Voice from  
17 "Levitating," do you have any idea why it  
18 would come up with similarities to "Don  
19 Diablo"?

20 MS. LEPERA: Objection to form.

21 No foundation.

22 You can answer if you understand  
23 it.

24 A. Yes, I do have an idea, and that  
25 is because they are both based on a

1 descending scale that the -- that the  
2 software would not be able to distinguish  
3 as a major descending scale, that is, a  
4 decent based on a major scale in "Don  
5 Diablo" and a decent based on a minor  
6 scale in "Levitating." So the software  
7 can't ferret that out -- clearly, one's  
8 major; one's minor -- but what they both  
9 do, like the Czerny -- the 19th century  
10 Czerny exercise, bars five through eight  
11 in Opus 299, Czerny -- is they both move  
12 down in 20 notes that sound the same. In  
13 fact, they are different notes on  
14 different scale degrees, one in major and  
15 one in minor; whereas, in Czerny, they're  
16 identical in "Don Diablo" and Czerny.

17 So if, for example, one were to  
18 plug that in, it wouldn't surprise me, but  
19 it's not meaningful because what it's  
20 identifying is a descending repetitive  
21 flat-rhythmed scale which has differences,  
22 as I've just described, in modality and  
23 scale degree, but are just simply part of  
24 the same musical building block.

25 Q. If that part wasn't just a

1 musical building block, would that have  
2 any significance to your conclusion there?

3 MS. LEPERA: Objection to form.

4 A. It's simply too speculative. In  
5 order for the portion at issue not to have  
6 a musical building block status, it would  
7 have to be different. You're asking me to  
8 speculate how different it could be. I  
9 mean, what are the possible permutations  
10 of the differences? So no. It's a purely  
11 speculative question to which I don't  
12 think my role is to answer.

13 Q. I want to go back and ask you  
14 about Geluso report.

15 MS. LEPERA: It's actually  
16 Geluso, I've learned myself; it's not  
17 a hard G.

18 MR. BROWN: Let me --

19 (Whereupon, simultaneous  
20 conversation took place disrupting the  
21 record, and the court reporter  
22 requested one person speak at a time  
23 without interruption from anyone  
24 else.)

25 MS. LEPERA: We're good.

1 Q. Let me apologize in advance  
2 because, once I misremember a name, it may  
3 stick, but tell me about your relationship  
4 with -- is it Mr. Geluso or Dr. Geluso?

5 A. Okay. You said "go back to." I  
6 believe we --

7 Q. I want to go back to talking  
8 about other people in the case.

9 A. Okay. I didn't hear the --

10 Q. You got me.

11 A. No problem. Paul Geluso,  
12 G-E-L-U-S-O, is a professor at New York  
13 University in the Steinhardt School. It  
14 has a major program in music technology,  
15 bachelor's, master's and Ph.D., and as  
16 department chair for 16 years, it is a --  
17 one of the programs like music theater and  
18 music business which is highly ranked  
19 throughout world and draws applicants from  
20 throughout the world.

21 Professor Geluso -- not doctor;  
22 he does not have a Ph.D. --  
23 Professor Geluso is the director of those  
24 programs, and my relationship with him is  
25 that when he came on -- I guess he came on

1 to the faculty sometime in the 1990s. I  
2 became chair in 1995, and so I certainly  
3 would have met him by that point. I don't  
4 know that he was ever in any of my  
5 classes, but I would have met him as a  
6 colleague. Understand that after 16 years  
7 when I stepped down, there are more than  
8 400 faculty in Steinhardt Music and  
9 Performing Arts, essentially advising,  
10 mentoring, teaching 1,600 majors,  
11 baccalaureate to Ph.D., and another 13-,  
12 1,400 non-majors from throughout the  
13 university. They came to us for music,  
14 you know, classes, lessons, ensembles and  
15 the rest.

16 So in any given semester, the  
17 unit that I oversaw essentially was  
18 catering and serving about 3,000 students  
19 with more than 400 faculty. He would have  
20 been one of those, but I certainly do  
21 remember him as a kind of a bright light.  
22 He joined the full-time faculty in 2012,  
23 as I recall, about 12 years ago.

24 Q. How often do you speak with him?

25 A. Rarely. We see each other at



1 faculty meetings, sometimes -- in fact, as  
2 I recall, the last faculty meeting -- my  
3 office is on the sixth -- the 11th floor,  
4 his office is on the sixth floor, and he  
5 came into the elevator. I was standing  
6 there with other colleagues, going down to  
7 the third floor where we had our faculty  
8 meeting. It's just kind of a happenstance  
9 kind of a meeting, but that's basically  
10 it.

11 Q. When you say "rarely," is it,  
12 like, four times a year?

13 A. During meetings.

14 Q. How often -- how many times a  
15 year, approximately?

16 A. Meetings, usually, monthly.

17 Q. Did you ever discuss this case  
18 with him?

19 A. No. As a rule, I do not discuss  
20 a case that I'm working on with another  
21 musicologist, let alone another person.  
22 So no, I have not discussed this with  
23 Professor Geluso.

24 Q. Did you have occasion to see his  
25 report in this case?

1           A.       I was given -- not in the final  
2       form, but I was given some portions of his  
3       report, mostly the spectral, the spectral  
4       grams, the spectral analysis, and that's  
5       it, but it was before -- I believe before  
6       the final report. I just don't remember  
7       the dates now.

8           Q.       And again, if there's a lawyer  
9       involved, I don't want to hear about this,  
10      but did you edit portions of that?

11                  MS. LEPERA: Objection to form.  
12                  Just for clarification, edit portions  
13                  of Professor Geluso's report?

14           Q.       Professor Geluso's report that  
15      you just referred to, that you saw  
16      portions of.

17           A.       I recall discussing the report  
18      with --

19                  MS. LEPERA: He doesn't want to  
20                  know.

21           Q.       I don't want to know about your  
22      discussions with counsel. I want to know  
23      if you edited any portion of it yourself.

24           A.       I can't say that I remember.

25           Q.       How many -- strike that.

1 Do you know if -- strike that as  
2 well.

3 Were there any conclusions you  
4 disagreed with in his report?

5 A. To the extent that I would have,  
6 I would have articulated them in  
7 confidential conversation. So I don't  
8 recall finding fault with any of the  
9 conclusions.

10 Q. Again, I don't want to hear  
11 counsel. I'll keep saying that again, but  
12 I do want to know that if you had  
13 suggestions, was it because that you  
14 thought there was something substantively  
15 inaccurate about an earlier iteration of  
16 his report?

17 MS. LEPERA: Objection. No  
18 foundation.

19 A. I have to listen to my answer.  
20 Did I say "make suggestions"? I don't  
21 know that I made suggestions.

22 Q. Did you make suggestions?

23 A. I don't --

24 MS. LEPERA: Okay. No  
25 conversations with counsel.

1 Q. No conversations --

2 MS. LEPERA: So the question is:  
3 Did you make suggestions?

4 And what's the rest of the  
5 question?

6 Q. Did you have suggestions about  
7 his report in your mind that you may or  
8 may not have --

9 MS. LEPERA: Communicated, if  
10 you remember.

11 THE WITNESS: Yeah.

12 A. As per my earlier answer, I  
13 don't remember when I submitted the  
14 rebuttal report. Was his submitted as a  
15 rebuttal report?

16 MS. LEPERA: Nope. You don't  
17 have to go there.

18 A. I just don't remember.

19 MS. LEPERA: That's good enough.

20 Q. Did you see a final copy of his  
21 report?

22 A. No.

23 Q. Do you know if he saw your  
24 report?

25 MS. LEPERA: Objection. Which

1 one?

2 Q. Do you know if you saw your  
3 affirmative report?

4 A. I don't.

5 Q. Do you know if he saw either of  
6 your rebuttal reports?

7 A. I think -- again, this is going  
8 back to conversations with --

9 Q. No --

10 MS. LEPERA: Don't speculate.  
11 Don't speculate. Either you know from  
12 personal knowledge or you don't.

13 MR. BROWN: I'm not trying --  
14 let me -- I didn't mean to talk over  
15 you.

16 Q. I'm not even trying to  
17 indirectly elicit information that was  
18 discussed with counsel so --

19 A. Do you want to re-ask that --

20 MS. LEPERA: Can you repeat it?

21 MR. BROWN: Could you read back  
22 the last question, please?

23 (Whereupon, a portion of the  
24 record was read back.)

25 "QUESTION: Do you know if he

1 saw either of your rebuttal reports?

2 "ANSWER: I think -- again, this  
3 is going back to conversations with --

4 "QUESTION: No" --

5 Q. Do you know whether he saw your  
6 report -- your rebuttal reports at any  
7 point before he issued his reports?

8 MS. LEPERA: Other than through  
9 conversations with counsel, do you  
10 know whether or not he saw any --  
11 either of your two rebuttal reports at  
12 any point in time?

13 MR. BROWN: Thank you. That's a  
14 standing thing about other than  
15 counsel. Thank you.

16 A. As I try to remember back, you  
17 know, these months, I think that I was  
18 informed that he had a portion --

19 Q. Again, if you're informed  
20 through counsel, I don't want to know.  
21 Do -- if you --

22 MS. LEPERA: That's what I was  
23 saying. Other than through  
24 conversations with counsel, do you  
25 have any knowledge about this?

1 THE WITNESS: Oh.

2 A. No.

3 MS. LEPERA: That's it.

4 A. No.

5 Q. One last background question:

6 What is your favorite song to perform?

7 MS. LEPERA: Objection. No

8 foundation.

9 Q. In your dance band?

10 MS. LEPERA: Still no

11 foundation.

12 A. It's been too many years, but it

13 was a wonderful time that helped to pay

14 for bills while I was just starting out at

15 NYU and preschool for my children and all

16 of that. It was a part that I relished

17 quite a bit.

18 Q. I want to walk-through your very

19 lengthy Plaintiff's Exhibit 1 which is

20 your affirmative report.

21 MS. LEPERA: You're okay with

22 him having it in front of him?

23 MR. BROWN: Yeah.

24 MS. LEPERA: Great.

25 Q. And certain times, I'll refer

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1 you directly to things, and certain times,  
2 I may be in front of you. But again, as  
3 we indicated earlier, this is not a  
4 memorization. So if there's stuff you  
5 need to look back at to refresh your  
6 recollection, be my guest. Just tell me  
7 you're going to be doing it if I don't  
8 direct you to a particular paragraph.

9 But on page two, you talk about  
10 that it's your understanding that fact  
11 discovery has not yet begun in this matter  
12 and you reserve the right to amend,  
13 modify, supplement this report on the  
14 basis of such discovery or otherwise as  
15 new information becomes available.

16 Do you remember writing that?

17 A. I remember having --

18 MS. LEPERA: No conversations  
19 with counsel.

20 A. Yeah.

21 Q. Do you remember writing this?

22 A. Yes.

23 Q. Was this your full report based  
24 from -- strike that.

25 Is this the initial iteration of

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1 the report?

2 MS. LEPERA: Objection to form.

3 A. Initial -- that is 2021?

4 Q. I'm not talking about -- in the  
5 past you indicated that you may have given  
6 some sort of consulting report, correct?

7 MS. LEPERA: Objection to form.

8 No foundation.

9 A. No, I did not -- I can't testify  
10 to what I did as a consultant because it's  
11 privileged.

12 MS. LEPERA: Right.

13 A. I did not write a report before  
14 this.

15 Q. Was there an earlier iteration  
16 of this report?

17 MS. LEPERA: Objection to form.

18 That's the same question.

19 A. Do you mean -- well, no. To the  
20 extent that it evolved from page one to  
21 page five to page, you know, 50 and so  
22 forth.

23 Q. Was there an earlier draft that  
24 there were substantive changes?

25 A. Ah -- question. There was an

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1 earlier essentially completed draft that I  
2 sent to --

3 MS. LEPERA: Again, we're not  
4 going --

5 Q. -- earlier draft, then it's a  
6 yes or no.

7 MS. LEPERA: That's it.

8 A. There was an earlier essentially  
9 complete draft.

10 Q. Do you know -- strike that.  
11 Do you recall what the changes  
12 are from the earlier draft to this draft?  
13 And let me ask you a question in between.  
14 So I will withdraw that.

15 So there was a first draft. And  
16 is this the only other draft, or are there  
17 any drafts in between the first draft and  
18 this?

19 MS. LEPERA: Let me just have a  
20 continuing line of objection to any  
21 discussion about what -- how many  
22 drafts, what changes were made in  
23 drafts, conversations with counsel  
24 about changes in draft because that is  
25 all, under the rules, subject to

1 privilege.

2 Q. I'm not asking about anything  
3 that was a conversation with counsel at  
4 all.

5 A. Right.

6 Q. But how many different drafts  
7 were there?

8 MS. LEPERA: You can answer that  
9 if you know the number, but other than  
10 that, no content.

11 A. I don't know. I think the word  
12 "drafts," how many "other drafts," is  
13 somewhat of a misnomer because the first  
14 draft was essentially a finished draft.  
15 What might have gone back and forth might  
16 have been stylistic, grammatical. At one  
17 point, I had a problem with formatting,  
18 believe it or not. My Word was just going  
19 crazy. I didn't know why. I couldn't  
20 figure out the formatting issue. So it  
21 was those kinds of things.

22 So is it possible -- would I  
23 have sent a draft with a formatting  
24 problem noting there's a formatting  
25 problem and then receiving -- I can't

1 talk -- essentially having that corrected.

2 So the idea that there were  
3 drafts suggesting that there were  
4 substantive changes from draft to draft is  
5 simply not reflective of what occurred.

6 Q. Wasn't suggesting it; was asking  
7 it. And then we can move on.

8 Going back to paragraph four  
9 about fact discovery has not yet begun in  
10 this matter, what facts, if anything, do  
11 you think you could learn that would  
12 change some of your opinions in this case?

13 MS. LEPERA: Objection.

14 Speculation. Out of context.

15 You can answer if you  
16 understand.

17 A. Well, this is something that  
18 I've actually seen in this insert, seen in  
19 reports of other musicologists on the  
20 other side. In fact, I see it more often  
21 than not, and so it's not -- it's  
22 certainly not new to me.

23 And the point is: What other  
24 facts would come forward? Well, the  
25 Salani deposition, that certainly had not

1 occurred here -- that's part of fact  
2 discovery -- the Calello deposition. And  
3 so to the extent that those depositions  
4 and that part of fact discovery had not  
5 yet occurred, I wanted to make certain  
6 that, to the extent that there were  
7 important fact issues in that were  
8 musicological issues, that I would be able  
9 to respond to them.

10 Q. Did you, in fact, at some point,  
11 view the Salani deposition?

12 A. No.

13 Q. Did you read the Salani  
14 deposition?

15 A. No.

16 Q. Did you view the Calello  
17 deposition?

18 A. No.

19 Q. Did you read the Calello  
20 deposition?

21 A. No.

22 Q. If I'm to understand this  
23 report -- and if you disagree with my  
24 understanding, please correct me -- one of  
25 your conclusions is that "Levitating" is

1 original, correct?

2 MS. LEPERA: Objection to the  
3 form. Preamble. References about  
4 "your understanding."

5 A. I don't recall using the term  
6 "original" for "Levitating." My  
7 recollection is that the analyses that  
8 I've done of "Levitating" point to the  
9 portions that are at issue and the fact  
10 that they are essentially a musical  
11 building block and to the portions that  
12 are not at issue and the fact that they  
13 are different and that the songs, in their  
14 entirety, at issue are quite different.  
15 So I don't recall -- you have to point me  
16 then, please -- wherein where I say  
17 "Levitating" is an original composition.

18 Q. We'll get to that as we work  
19 through the report, and you'll have ample  
20 opportunity to talk about that. But if  
21 you were aware that one of the Defendants  
22 had actually testified -- and this is a  
23 hypothetical -- that he or she had strove  
24 to copy "Don Diablo," would that change  
25 your opinion at all?

1 MS. LEPERA: Objection to form.  
2 You can answer if you  
3 understand.

4 A. Yeah. It is extrinsic to the  
5 musicological analysis. Musicological  
6 analysis looks at the portions that are at  
7 issue, and to the extent that we're  
8 talking about a repeated-note descending  
9 scale -- which has been around for  
10 centuries -- and a patter style -- that is  
11 singing one syllable per note with rapid  
12 note is patter style, sometimes called  
13 patter song -- the point is: To look at  
14 that would undercut -- would undercut  
15 the -- any suggestion of there being a  
16 significant purported copying. So no,  
17 it's really extrinsic to what a  
18 musicologist does.

19 Q. Would it undercut any  
20 conclusions about originality?

21 MS. LEPERA: Same objection.  
22 And vague and ambiguous. Originality  
23 of what?

24 A. First, let me say my  
25 understanding of original, in the law, is

1 independently created. Original in  
2 musicology generally tends to be the usual  
3 English version, and that is first. And  
4 so I know that one could give an example  
5 of someone writing something that had  
6 already existed, but having no access to  
7 that. You lived on a desert island and  
8 you had no access to the original work,  
9 would that be considered original? Under  
10 the law, the answer would be, I  
11 understand, yes, to the extent that I  
12 understand that little bit.

13 A musicologist might say, well,  
14 no, it's not original because it was  
15 written ten years before, 20 years before.  
16 So I try not to use the word "original"  
17 because I'm aware that there's a  
18 difference in the way musicologists use it  
19 and, sometimes, under the legal use of the  
20 term.

21 Q. So the concept of access would  
22 have no impact on your report, is that  
23 what you're saying?

24 A. The concept of access I would  
25 consider to be extrinsic -- largely



1 extrinsic to musicology, and certainly,  
2 one can find -- the trier of facts can  
3 find access and still find no  
4 infringement. Access, in and of itself,  
5 does not necessarily mean copying, and it  
6 certainly doesn't mean a substantial  
7 similarity, as I it understand that legal  
8 term, but do not opine as a musicologist.

9 Q. What is patter?

10 A. Well, patter by itself  
11 doesn't --

12 MS. LEPERA: I'm going to object  
13 to the form of the question. I assume  
14 you're meaning as used in this report,  
15 but I don't mean to presume.

16 A. Patter song, patter style, these  
17 are two terms that are interchangeable. It  
18 is rapidly singing syllabically one note  
19 per syllable.

20 Q. Is a style a building block?

21 MS. LEPERA: Objection to form.

22 A style of what?

23 Q. Is patter style a building  
24 block?

25 A. That's different. Patter style,

1 as I've just defined it -- which I think  
2 is consistent with the way it's defined;  
3 that is, rapid singing syllabically one  
4 note per syllable -- that is a certainly a  
5 building block. It's been around at least  
6 since Mozart through the opera composers  
7 in the early Romantic period in Italy  
8 through the operettas of Gilbert and  
9 Sullivan, all of those in the public  
10 domain, as well as other prior art.

11 Q. And when I asked you earlier to  
12 list different things that were building  
13 blocks, you didn't list patter style --

14 MS. LEPERA: Objection to form.

15 Q. -- do you recall that?

16 A. As I said, you're asking me on  
17 the fly, and I did not suggest and,  
18 certainly, the record will show that I did  
19 not suggest that my answers were even  
20 remotely exhaustive.

21 Q. Can I find in a book anywhere  
22 that patter style should be considered a  
23 musical building block?

24 MS. LEPERA: Objection to form.

25 A. Consistent with my testimony

1 earlier, to the extent that the entry on  
2 key doesn't say key, it's fundamental, oh,  
3 by the way, it's a musical building block.  
4 It doesn't have to say that. When you say  
5 that there are two basic keys, you know  
6 that it's a fundamental building block.  
7 You don't have to say the same with  
8 scales. You don't have to say the same  
9 with patter style or patter song. It's  
10 understood. It's commonplace. It is a  
11 building block which -- upon which other  
12 elements are built.

13 Q. Going back to my question, where  
14 can I find it, if at all, in writing that  
15 patter style should be considered a  
16 building block?

17 MS. LEPERA: Objection to form.

18 A. Once again, it's consistent with  
19 musicological --

20 (Whereupon, simultaneous  
21 conversation took place disrupting the  
22 record, and the court reporter  
23 requested one person speak at a time  
24 without interruption from anyone  
25 else.)

1 MS. LEPERA: Well, don't  
2 interrupt the witness. Don't  
3 interrupt the witness. And there's no  
4 foundation. I object to the form of  
5 the question.

6 You can answer once again.

7 A. I am not aware where one can  
8 find a source that says patter style or  
9 patter song is, quote/unquote, a musical  
10 building block. That it has existed in a  
11 commonplace manner for centuries is the  
12 functional issue here. That is, is this  
13 something that needs to be filtered out as  
14 something that is commonplace and has been  
15 for centuries or not? I think the answer  
16 to that is clearly: It needs to be  
17 filtered out because it's been  
18 commonplace -- so commonplace and upon  
19 which other elements are built that this  
20 would be a paradigm example of a musical  
21 building block.

22 Q. What is filtering?

23 MS. LEPERA: Objection to form.

24 As he's used the term?

25 Q. What is filtering as you just

1 used the term and throughout your report?

2 A. It is my understanding that the  
3 expectation in various circuits in the  
4 United States, not be limited to music  
5 copyright cases, is that an expert will  
6 filter out -- I think it's called the  
7 filtration process -- but will literally  
8 filter out elements that are commonplace,  
9 elements that are in the public domain.

10 So based on that, my  
11 understanding that expectation by courts  
12 that one of the roles of the expert is,  
13 for example, in doing analysis and prior  
14 art analysis to filter out something like,  
15 well, patter song. They're both in a  
16 patter style. That would be filtered out  
17 because it has been commonplace for  
18 centuries.

19 Q. If you had a 16-note descending  
20 scale followed by a D, C, D, something  
21 along those lines, would each part  
22 separately be considered commonplace?

23 MS. LEPERA: Objection. Vague  
24 and ambiguous.

25 But you can answer.

1           A.           Purely too speculative. What  
2 notes? What three notes? What are the  
3 rhythms? What -- you know, in what  
4 context, the overall works and so forth.  
5 You're asking me to speculate, and I  
6 really can't.

7           Q.           Well, I want to understand your  
8 prism of analysis. So if you had all in  
9 eighth notes and then you had  
10 16 descending notes followed by a note  
11 that went up, down and up --

12          A.           Okay.

13                   MS. LEPERA: I'm going to object  
14 to the form of the question.

15                   Obviously, if you understand.

16          A.           At least for the record, so the  
17 reader of this will understand -- because  
18 I think your question is really quite  
19 ambiguous -- we have 20 notes at issue.  
20 They're all 16th notes. This is between  
21 "Diablo" and "Levitating." 20 notes  
22 starting on different scale degrees, but  
23 descending if you put them in relative  
24 keys on white notes. Those 20 notes are a  
25 musical building block that is consistent

1 not only with my report but with the prior  
2 art. You have the identical 20 notes  
3 descending as 16th notes in Czerny Opus  
4 299 in the same key -- that is, in a major  
5 key -- as in "Diablo."

6 So even given the differences,  
7 the point is those 20 notes are musical  
8 building blocks. I don't say that the --  
9 what in, I believe -- let's see -- bar ten  
10 in the -- in the Salani and Calello  
11 reports, bar ten are the first 16 of those  
12 notes to the best my recollection. The  
13 next four on beat one of bar 11 in their  
14 transcriptions -- this would be example 3A  
15 in Calello. So you have 20 notes from  
16 what he calls bar ten. Again, it's a  
17 mistake, but the point is bar 10 to the  
18 first beat of bar 11. But then you have  
19 different notes -- one goes up, one goes  
20 down -- which is kind of like what you're  
21 asking. That was part of your  
22 description. The 20 notes are the notes  
23 that are at issue.

24 Indeed, I believe it was the  
25 Salani report -- it might have been

1 example four-something -- where, in the  
2 Salani report, Salani states, this is  
3 what's at issue, and puts a red  
4 rectangular box around those 20 notes, not  
5 the two or three notes that follow. We're  
6 in agreement, that is, those 20 notes are  
7 the notes that are at issue.

8 In the filtration process, to  
9 the extent that I've established that  
10 those 20 notes exist in prior art or the  
11 similarities between them -- because there  
12 are differences, as you know, not only on  
13 scale degree, but differences also in  
14 modality and harmony that surrounds it,  
15 all those differences -- the point is that  
16 to the extent that I've shown that the  
17 proper filtration process is -- and  
18 whether you have a problem with calling it  
19 a musical building block or simply calling  
20 it commonplace, the point is it was  
21 commonplace prior to "Don Diablo."

22 To the extent that you filter  
23 that out, what's left, use the Salani  
24 transcription with the red and the black  
25 overlay of "Don Diablo" and "Levitating,"



1 use the Calello transcription with the  
2 same overlay. And what do they show? One  
3 note. One note that lands that's the  
4 same. And so when you do the filtration  
5 process as a musicologist and you filter  
6 out those first 22 notes, then the next  
7 few notes go in different direction --  
8 they're different -- and then they land on  
9 the same last note. What do you filter  
10 out? You filter out different notes, you  
11 filter out the 20 notes that are  
12 commonplace, clearly, and public domain,  
13 and what you're left with is one note.  
14 You simply cannot suggest that that  
15 similarity that remains after the  
16 filtration process is meaningful or  
17 significant.

18 Q. And this may be extrinsic -- and  
19 you can tell me that, but why would the  
20 listener's experience perceive that "Don  
21 Diablo" and "Levitating" sound similar?

22 MS. LEPERA: Objection. No  
23 foundation.

24 A. Well, I think the second part of  
25 the objection is the key. I'm not aware

1       that the Plaintiff's experts -- and I  
2       certainly didn't -- conducted a survey of  
3       thousands of people and, on the basis of  
4       that survey, found that a certain number  
5       thought this or that, whatever the  
6       questionnaire might have been. And so  
7       your question's purely speculative.

8               MS. LEPERA: I hate to bother  
9       you again, but I do need to use the  
10      restroom. I can wait a little bit if  
11      you just want to finish your line of  
12      questioning, 100 percent.

13      Q.       In one of the YouTube videos,  
14      for example, there's a lot of commentary  
15      indicating that "Don Diablo" and  
16      "Levitating" sound similar. Do you have  
17      any idea why the listener would have that  
18      experience?

19              MS. LEPERA: Objection to form.  
20      Same thing. No foundation. What  
21      YouTube video?

22      A.       You're asking me to opine on the  
23      lay listener and what the lay listener may  
24      or may not -- my answer is -- and this is  
25      part speculation -- is the fact that

1 they're listening to a musical building  
2 block that has similarities in 20 notes.  
3 And so yes. But the fact that a listener  
4 can point to that similarity does not  
5 undermine the fact that that similarity  
6 represents no more than a musical building  
7 block, no more than commonplace musical  
8 expression that was commonplace and  
9 already in the public domain before "Don  
10 Diablo" was created.

11 MS. LEPERA: I apologize.

12 MR. BROWN: No. That's fine.

13 MS. LEPERA: And lunch is here  
14 too.

15 MR. BROWN: Lunch and a break.  
16 Thank you. We can go off the record.

17 THE VIDEOGRAPHER: Off the  
18 record. The time is 12:30 p.m.

19 (Whereupon, a lunch break was  
20 taken at 12:30 p.m.)

21 (Whereupon, the last question  
22 was read back.)

23 "ANSWER: You're asking me to  
24 opine on the lay listener and what the  
25 lay listener may or may not -- my

1           answer is -- and this is part  
2           speculation -- is the fact that  
3           they're listening to a musical  
4           building block that has similarities  
5           in 20 notes. And so yes. But the  
6           fact that a listener can point to that  
7           similarity does not undermine the fact  
8           that that similarity represents no  
9           more than a musical building block, no  
10          more than commonplace musical  
11          expression that was commonplace and  
12          already in the public domain before  
13          "Don Diablo" was created."

14                   THE VIDEOGRAPHER: Back on the  
15          record. The time is 1:43 p.m.

16          Q.        Doctor, I remind you you're  
17          still under oath.

18          A.        Yes. Thank you.

19          Q.        All right. I'm going to do my  
20          bad singing: Dum, dum, dum, dum.

21          A.        Yes.

22          Q.        Do you know what that is?

23                   MS. LEPERA: Is that a question?

24          A.        The opening four notes of  
25          "Symphony No. 5" by Beethoven.

1 Q. And under a building blocks  
2 theory, would that be original or not  
3 original?

4 MS. LEPERA: Objection to form.

5 It's a vague and ambiguous --

6 (Whereupon, simultaneous  
7 conversation took place disrupting the  
8 record, and the court reporter  
9 requested one person speak at a time  
10 without interruption from anyone  
11 else.)

12 MS. LEPERA: Vague and ambiguous  
13 use of terms.

14 You can answer.

15 A. It's a complete anomaly. The  
16 first four notes, G, G, G, E-flat --  
17 that's five, five, five, three -- because  
18 it continues, by the way, to F, F, F, D.  
19 So it's really eight notes; you just sang  
20 the first four of the eight. And what is  
21 special about that is that, as essentially  
22 every musicologist knows, the most simple  
23 and expected direction for -- given a  
24 perfect example of -- a motif is what  
25 that's called -- a short motif starts on

1 scale degree five. Five, four, three,  
2 two, one. What do we have in the opening  
3 eight notes of the "Fifth Symphony"? We  
4 have five, five, five, three; four, four,  
5 four, two. What do we want to hear? One.  
6 We're dying to hear one because that is  
7 the natural -- that is the natural  
8 inclination of scale degrees, five, four,  
9 minor scale, three, two, one. But  
10 instead, what Beethoven does -- and that's  
11 why it's anomalous -- is five, five, five,  
12 three -- and a long three -- four, four,  
13 four, two -- and a long two -- not flat  
14 rhythm. And then what do we have? Da,  
15 da, da, da, da, da, da, da, a  
16 development of that motif. Completely  
17 different, and it's on opposite planets.

18 And so do I think the first four  
19 notes are necessarily a building block?  
20 Not necessarily. Is it now a -- iconic?  
21 Yes. But it is so different from the  
22 expression that's at issue that it really  
23 is quite -- and it's also anomalous  
24 because there's nothing quite like the  
25 opening of "The Fifth Symphony."

1 Q. When you say it's "anomalous,"  
2 was it original?

3 MS. LEPERA: Objection to form.  
4 Vague and ambiguous terms.

5 A. Using the word "original" from a  
6 musicological perspective meaning the  
7 first, first of all, we know that  
8 Beethoven himself, prior to "The Fifth  
9 Symphony" wrote figures with five, five,  
10 five, three, but not with five, five,  
11 five, three, long rest. And so is it  
12 original? Some musicologists have  
13 suggested that those first four notes is  
14 something that had been used in other  
15 works before. I haven't done a study of  
16 that; I'm just simply reporting. But  
17 five, five, five, three, four, four, four,  
18 two, the way that is actually composed, to  
19 the best of my knowledge, I believe that,  
20 from a musicological perspective, it is  
21 original.

22 Q. You think the originality about  
23 that is a harder case rather than  
24 determining whether it was unmistakable  
25 song?

1 MS. LEPERA: Objection to form.  
2 Vague and ambiguous terminology. No  
3 foundation.

4 A. Yeah. I don't quite understand  
5 your question.

6 Q. If someone were to say that  
7 was -- strike that.

8 Someone were to say, this is  
9 unmistakably Beethoven, but was it  
10 unoriginal? That's a harder case. Do you  
11 mean what they would mean by that?

12 MS. LEPERA: Objection to form.  
13 Speculation. No foundation.

14 A. I don't know, especially with  
15 the way you're talking about. I think  
16 I've already answered the question as to  
17 originality.

18 Q. Well, these are your words. So  
19 I'm trying to understand how it's  
20 reconciled with what you just said.

21 MS. LEPERA: Objection.  
22 Objection.

23 A. Which of those words are mine?

24 Q. This is unmistakably Beethoven,  
25 but was it original. That's a harder



1 case.

2 A. Yeah, but you said something  
3 about --

4 (Whereupon, simultaneous  
5 conversation took place disrupting the  
6 record, and the court reporter  
7 requested one person speak at a time  
8 without interruption from anyone  
9 else.)

10 MS. LEPERA: Everybody slow  
11 down.

12 MR. BROWN: I apologize to  
13 everyone.

14 MS. LEPERA: And put quotes  
15 around something if you're quoting  
16 someone rather than --

17 Q. Quote, Ferrara then played the  
18 most famous four note sequence in  
19 classical music, the opening of  
20 Beethoven's fifth, G, G, G, E-flat. This  
21 was unmistakably Beethoven. But was it  
22 original?

23 And now, quote -- from you --  
24 that's a harder case, Ferrara said.  
25 Although other composers wrote that,

1 Beethoven himself wrote that in a piano  
2 sonata, and you can find figures like that  
3 in composers who predate Beethoven.

4 What did you mean by that versus  
5 what you just said?

6 A. I --

7 MS. LEPERA: Objection.

8 Mischaracterizes and misstates what  
9 the witness said. And also vague,  
10 ambiguous, overbroad and compound.

11 Q. If there's any difference?

12 A. I think that it's consistent  
13 with the passage that you just read, and  
14 that is, that it is my understanding  
15 that -- first of all, I think it's in the  
16 "Pathétique" sonata of Beethoven which  
17 predates the "Symphony No. 5."  
18 "Pathétique" is probably around 1899.  
19 "The Fifth Symphony" was debuted in 1808.

20 And so it is my understanding  
21 that the "Pathétique" piano sonata,  
22 Opus 13, has that figure in it. I can't  
23 tell you offhand where that is, but I've  
24 already read that other composers have  
25 certainly written five, five, five, three.

1           My point is that then I added  
2           the fact that -- in my answer so it's  
3           consistent with my answer -- then I added,  
4           but don't forget that it's eight notes.

5           And one of the distinctive  
6           things about it is that we're robbed of  
7           the resolution of one which is not the  
8           case in Diablo and "Levitating" which is  
9           five, four, three, two, one. That's in  
10          major, the five, four, three -- three  
11          minor, two, one, that would be minor  
12          depending on, you know, what scale degree  
13          you start.

14          So the point is that one of the  
15          things that is memorable and moving about  
16          the Beethoven is the robbing of the  
17          resolution to scale degree one which is  
18          absolutely not the case in "Dionne Diablo"  
19          (sic) and "Levitating" which ultimately  
20          move down to a -- more of a resolution  
21          than, of course, is the case in the  
22          opening of the Beethoven "Fifth Symphony."

23          Q.       By the way, thank you very much  
24          for flattering me with recognizing what I  
25          was trying to do. So I appreciate that.

1 Next thing, (clapping) are you  
2 familiar with the beginning of "We Will  
3 Rock You" by Queen?

4 MS. LEPERA: Objection to form.

5 A. Yes.

6 Q. How does it --

7 MS. LEPERA: Objection to --  
8 wait. Wait. Wait. Objection to  
9 form. The clapping is not a question,  
10 and then there was a question. So to  
11 the extent the witness is answering  
12 the question as opposed to confirming  
13 that the clapping was representative  
14 of the motif, I want to make that  
15 objection.

16 MR. BROWN: We can strike my  
17 poor clapping and -- rhythm and all.

18 MS. LEPERA: Thank you.

19 Q. Going back, are you familiar  
20 with the opening from Queen's "We Will  
21 Rock You"?

22 A. Yes.

23 Q. How would you describe that  
24 opening?

25 MS. LEPERA: Objection to form.

1                   You can answer.

2           A.       It's largely the way you clap  
3       conflated.

4                   (Whereupon, the Stenographer  
5       spoke.)

6           Q.       Is there any musical way that  
7       you can write that if you were going to  
8       put it on a page --

9                   MS. LEPERA: I have a question.  
10                   (Whereupon, the Stenographer  
11       spoke.)

12          Q.       Let's go back to my questions.  
13       I'll withdraw whatever thing is pending.  
14       I'll try to rework it.

15                   Is that original opening to a  
16       song?

17          A.       I don't know.

18                   MS. LEPERA: Objection to form.

19          A.       I haven't done an analysis.

20          Q.       How many beats is the beats to  
21       that?

22                   MS. LEPERA: Objection to form.

23          Q.       If you know.

24          A.       It's dum, dum, dum, dum, dum,  
25       dum, and so I don't know -- I don't recall

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1 because I haven't listened to the opening  
2 of the Queen song for a long time. I  
3 don't know how many times it repeats. The  
4 actual figure, obviously, is three notes  
5 including the clap.

6 Q. Would you consider that just a  
7 building block?

8 MS. LEPERA: Objection to form.

9 A. I can't speculate as to that  
10 because I haven't done the analysis within  
11 the context of the whole, let alone with  
12 the other works that predate Queen that  
13 may have done the same thing.

14 Q. You don't know whether that  
15 excerpt by itself constitutes just a  
16 building block?

17 MS. LEPERA: Objection. Asked  
18 and answered.

19 A. I've answered the question. My  
20 answer is the same.

21 Q. I don't think you did. I think  
22 you answered it with conditions saying  
23 that -- because you haven't done a full  
24 analysis and because you haven't done a  
25 prior arts. And I'm asking you if you

1 know one way or the other without doing  
2 that whether that is a building block or  
3 not.

4 MS. LEPERA: Objection to form.  
5 Misapprehends the entirety of the  
6 witness's testimony.

7 But you can answer.

8 A. You're asking me to suspend the  
9 musicological expectations for an  
10 analysis. What I said is I can't answer  
11 that without doing a proper musicological  
12 analysis, and so that remains the same  
13 answer for those reasons.

14 Q. Are you familiar with the  
15 litigation concerning Vanilla Ice and  
16 David Bowie/Queen?

17 MS. LEPERA: Objection to form.  
18 No foundation.

19 A. I know I was much earlier. It's  
20 been a while. So I can't be explicit  
21 about exactly what was at issue, but I do  
22 know the case.

23 Q. Are you familiar with the notes  
24 at issue in that at all?

25 MS. LEPERA: Objection to form.

1 A. No, I'm not. I don't recall.

2 Q. Do you know one way or the other  
3 whether that case implicated building  
4 blocks?

5 MS. LEPERA: Objection to form.

6 A. No, I do not.

7 Q. I didn't have -- strike that.

8 How many cases have you and  
9 Geluso both provided expert reports for at  
10 the same time?

11 MS. LEPERA: Geluso.

12 Q. Geluso. Strike that.

13 A. Could you repeat question,  
14 please?

15 Q. Do you know how many cases  
16 Geluso has provided an expert report in  
17 addition to you?

18 MS. LEPERA: Objection to form.

19 You can answer.

20 A. That is, in a case in which we  
21 were both providing reports?

22 Q. Yes.

23 A. I don't, no.

24 Q. Was it more than once?

25 A. Yes.



1 Q. More than five times?

2 A. Perhaps.

3 Q. More than ten times?

4 A. I doubt it.

5 Q. Do you recall the first time he  
6 issued a report with you?

7 MS. LEPERA: Objection to form.  
8 Characterization.

9 Q. Strike that.

10 Do you recall the first time  
11 that you and he both issued reports in the  
12 same case?

13 MS. LEPERA: Are you saying on  
14 the same side or either way?

15 Q. Either way.

16 A. I do not.

17 Q. Have you ever issued a report  
18 that's adverse to Geluso?

19 MS. LEPERA: Objection to form.  
20 But you may answer it.

21 A. I don't recall that I ever have.

22 Q. On page nine of your report, you  
23 use the term "popular music." How do you  
24 define popular music?

25 A. Popular music is a broad

1 category that literally points to all  
2 popular music as opposed to what's called  
3 art music, classical music. Art music  
4 subcategories under that would be dance  
5 music. Popular music would include rap,  
6 would include country. It's a very, very  
7 broad --

8 Q. When you're saying it's found in  
9 popular music, are you suggesting that the  
10 music it's found in were hits of some  
11 sort?

12 MS. LEPERA: Objection to form.

13 A. Can you point me to which  
14 paragraph?

15 Q. Sure. The -- paragraph 20, last  
16 sentence, that starts at, importantly, why  
17 don't you take a moment and read that  
18 sentence?

19 A. Okay. What I was  
20 distinguishing -- and let me read it. The  
21 melodic similarity -- that's the melodic  
22 similarity at issue; continuing -- is  
23 merely the use of a musical building block  
24 found in prior art dating back to at least  
25 the 19th century and that is found in

1 popular music that predates the release of  
2 "Wiggle."

3 In the music of, for example,  
4 Czerny and Arban and Löschorhorn, either  
5 exercise the studies, those are part of  
6 19th century music, but they're certainly  
7 not popular music. Löschorhorn, Arban,  
8 Czerny is not popular music. I was just  
9 simply providing two broad categories.

10 Q. So -- got you. So it's not  
11 suggesting that a popular music is a hit;  
12 it's just suggesting that popular music is  
13 the music not from the 19th century and  
14 more modern?

15 MS. LEPERA: Objection to form.

16 A. That's exactly right. So under  
17 this large collection of probably millions  
18 of works, you know, of the last century  
19 would be something like "Stayin' Alive,"  
20 1977 -- super hit by 1978 -- the Bee Gees,  
21 from Saturday Night Fever, that would be a  
22 hit, but I'm not suggesting that every  
23 popular work was such a hit. So I would  
24 have to say yes to your answer, that that  
25 is correct. I'm not it suggesting that

1 all of these were hits as, of course,  
2 "Stayin' Alive" was.

3 Q. Which alleged prior arts were  
4 hits; if you know?

5 MS. LEPERA: Objection to form.  
6 Contained in his report?

7 Q. Which prior arts contained in  
8 your affirmative report were hits; if you  
9 know?

10 A. Once again, "Stayin' Alive."  
11 From the popular music? I can't say  
12 whether "Contestación" -- that's a  
13 C-O-N-T-E-S-T-A-C-I-Ó-N -- was a hit;  
14 however, it was -- as far as I know, it  
15 was released by Trio La Rosa in 1958, and  
16 as per my report, there are at least  
17 eight covers of it, I think, seven of  
18 which predate "Wiggle." And on that  
19 basis, I have to say it was a pretty  
20 widely-distributed work. So whether it  
21 was a hit or not, I can't say. I can't  
22 say that it was a hit like "Stayin'  
23 Alive." So that would be the answer to  
24 that.

25 In terms of "El Cafetal" --

1       that's E-L, new word, capital  
2       C-A-F-E-T-A-L -- I don't know. That is an  
3       instrumental work. I don't know whether  
4       that was a, quote/unquote, hit. My  
5       understanding, in reading some of the  
6       background on "Se Dice" -- that's S-E,  
7       that's capital D-I-C-E -- that "Se Dice"  
8       was well known in Latin America. Whether  
9       that would be considered a hit or not I  
10      don't have sufficient data on.

11               And "Ging Gang Goolie" --  
12      G-I-N-G, Gang, G-A-N-G, and Goolie,  
13      G-O-O-L-I-E -- apparently well known in  
14      the scouting community, but throughout the  
15      world -- the international scouting  
16      community starting in 1920. And so that  
17      may have quite a few people who know it,  
18      but people -- or in the subcategory of the  
19      scouting movement. So I can't say whether  
20      that was a hit.

21               And again, the idea of Czerny  
22      being a hit or Löschnhorn being a hit,  
23      Arban being a hit is not apropos; however,  
24      as a person who taught piano -- I started  
25      giving piano lessons when I was about 15

1 and continued giving piano lessons  
2 privately for a while at NYU, but also  
3 privately until maybe the mid-1990s, I  
4 can't tell you -- I couldn't enumerate how  
5 many students studied Czerny under my  
6 tutelage. Czerny may be the most used  
7 author, composer of studies -- student of  
8 Beethoven, the teacher of Franz Liszt, one  
9 of the greatest pianists ever. He had so  
10 many books -- School of Velocity, School  
11 of Dexterity and so forth -- that -- and  
12 so you want to talk about the piano study  
13 repertoire? Czerny's music is a hit.  
14 It's widely known. Löschorh less so, but  
15 certainly known. Arban, it is iconic.  
16 That book is absolutely iconic. As I  
17 said, my son playing, by the way, da, da,  
18 da, da -- dum, dum, dum, dum, dum, dum,  
19 dum, dum, dum, dum, dum, dum, this is a  
20 standard trumpet exercise, by the way.  
21 Not just trumpet. It's four notes per  
22 scale degree moving down the white notes  
23 of the scale on a keyboard. It's also  
24 standard in string method books, C, C, C,  
25 C, B, B, B, B, A, A, A, A, G, G, G, G.

1 That's why we call it a musical building  
2 block. Today, you could probably point to  
3 tens of thousands of students on trumpet,  
4 on strings, violin, viola, cello, base,  
5 who play that generic, commonplace  
6 descending scale with four notes on each  
7 pitch moving down scalarly.

8 So for those reasons -- yeah,  
9 Arban, the book itself, that's a hit;  
10 again, a misnomer because of the genre,  
11 but when it comes to trumpet studies, it's  
12 "the" hit. And again, what we're talking  
13 about is something that those very  
14 well-known works -- the Arban, the  
15 Czerny -- are practiced. They are  
16 practiced as a basic exercise throughout  
17 the world.

18 Q. In your affirmative report, do  
19 you do an analysis of the rhythmic value  
20 of the notes?

21 MS. LEPERA: Objection to form.

22 Which notes? Which song?

23 Q. In your affirmative report, do  
24 you do any analysis of the rhythmic value  
25 of the notes of the songs at issue?

1           A.       You need to tighten that a  
2       little bit more. It's not just the  
3       rhythmic value of the notes of the songs  
4       at issue. Do I do that in parts that are  
5       not at issue? I don't --

6           Q.       Just for the parts at issue.

7           A.       Thank you. That's what I wanted  
8       you to tighten. Okay. And so the answer  
9       is: Yes, identify them as 16th notes, and  
10      that's part of the analysis, absolutely.

11          Q.       And do you recall how many  
12      rhythmic value notes they had in common,  
13      the three works at issue?

14                 MS. LEPERA: Objection to form.  
15      Now you're conflating all three  
16      together. So that's objection Number  
17      1. Are you asking him what he found  
18      or what he remembers?

19                 MR. BROWN: I'm ask asking him,  
20      Number 1, what he remembers, but if he  
21      doesn't remember, he's certainly  
22      welcome to refer to the report.

23                 MS. LEPERA: That would be, I  
24      think, the easiest solution.

25          A.       I appreciate that. Then I can



1 point the court and the reader of this  
2 transcript to the proper musical example.

3 So let's go to "Wiggle" and "Don  
4 Diablo" and the first transcription of the  
5 melodies at issue.

6 So the first transcription is on  
7 page 31 --

8 MS. LEPERA: Yes.

9 A. -- of my affirmative report, and  
10 that is musical example 5A. And what you  
11 have there are "Wiggle" and "Levitating."  
12 As you can see, all of the pitches -- this  
13 is in parallel keys first -- all of the  
14 pitches are different save for scale  
15 degree seven in bar two. So out of those  
16 first 22 notes in "Levitating," in that  
17 melodic phrase and 23 notes in "Wiggle,"  
18 it is only scale degree seven on a  
19 B-natural in "Wiggle" and B-flat -- which  
20 is a different pitch -- in "Levitating"  
21 that line up, and of course, the  
22 difference is just as stark in the next  
23 two bars. That's the first.

24 Now we go to the next musical  
25 example to continue my answer to your

1 question, how many line up. This now  
2 looks at the melodies at issue in "Wiggle"  
3 and "Levitating" in relative keys, and  
4 this is in musical example 5B on page 32.  
5 And once again, even an untrained eye can  
6 see, first, that the scale degrees are  
7 essentially completely different except  
8 for, once again, that scale degree seven  
9 which lines up on the second half of beat  
10 two in bar two; otherwise, scale degrees  
11 are completely different.

12 How many pitches are the same?  
13 Well, let's understand the definition of  
14 melody presented early on in the  
15 affirmative report. Single line of notes  
16 that essentially is constituted of pitch,  
17 rhythmic duration within an overall  
18 melodic phrase -- and rhythmic duration  
19 also includes metric placement, but  
20 rhythmic duration -- but here's the key:  
21 The definition continues, pitch is  
22 understood as the highness or lowness of a  
23 sound within the musical scale, okay?

24 So while one can say, in  
25 relative keys, that E, E, E, E, D are the

1 same pitches, they are on different scale  
2 degrees, and they function differently as  
3 per any musical dictionary. So the first  
4 five would line up. They are not the same  
5 in scale degree, but they are the same in  
6 pitch, rhythmic duration and metric  
7 placement, as I say in my analysis. Then  
8 the next note -- that's the first five.  
9 The next note obviously is different:  
10 Four is compared with three, that D as  
11 compared with E. The next note, that's D  
12 as compared with E, they're both 16th  
13 notes, that's Number 6. They line up. So  
14 we've got six so far. The next notes, the  
15 end of beat two in bar one, it's a D in  
16 "Levitating," but a C in "Wiggle." By any  
17 measure, not only are they different scale  
18 degrees, but different pitches. So that  
19 doesn't work. And of course, the rhythmic  
20 duration is different because, in  
21 "Wiggle," the C is held over. So it's  
22 length is actually that of an 8th note  
23 because it's tied over. And so the next  
24 note -- the ninth note in "Levitating" is  
25 obviously also not the same.

1                   So, so far, if my count is  
2                   right, we have six notes that are the same  
3                   in pitch, not the same in scale degree,  
4                   and the same in rhythmic duration and the  
5                   same in metric placement.

6                   We continue. So we have those  
7                   three. So that's six, that's nine, ten,  
8                   11. The next two are different, and then  
9                   we have four. So we have 15 that are the  
10                  same going into bar two, 15 that are the  
11                  same in "Levitating" and "Wiggle" out of,  
12                  as I said earlier, 23 notes in  
13                  "Levitating." And if I said 22 notes  
14                  earlier, I misspoke; it's 23 notes in  
15                  "Levitating," and here, in "Wiggle," it  
16                  is -- well, you have a tie. So it's  
17                  23 notes. So we're talking about five,  
18                  six, seven and five. There's 12, 16.  
19                  Doing this on the fly, but 16 notes and  
20                  then the last note. So 17 notes which  
21                  would be the same out of about 23.

22                  Remember that there are --  
23                  there's prior art that has many -- and  
24                  it's in this section of the report -- that  
25                  has many more similar notes to this

1 portion of "Levitating" than "Wiggle"  
2 does. And so those 17 notes, which are  
3 nothing more than moving down a scale on  
4 repeated notes, would be filtered out, in  
5 my opinion, based on sound musicological  
6 method.

7 Q. So that's 17 out of 23 notes, is  
8 that --

9 A. Well, that's only the first  
10 two bars. Then we move to the next  
11 two bars wherein -- you know what? I  
12 miscounted. Looking again -- just doing  
13 this on the fly -- let me give you the  
14 total number of notes in "Wiggle." So  
15 we've got 2, 6, 9, 10, 16, 20, 24. So  
16 there are 24 notes in that first melodic  
17 phrase in "Wiggle," 17 of which line up,  
18 and the way in which they line up is  
19 simply based on moving down the scale.

20 Moving to the next portion which  
21 is still a portion at issue, we have the  
22 three pickup notes at the end of the first  
23 staff, and then we have 4, 8, 12 -- 14  
24 plus 3 is 15. In the next bar, we have  
25 another 9. So once -- now we have 24

1 notes at issue in "Wiggle," and I am  
2 looking and there is zero -- once again,  
3 zero lining up of identical notes.  
4 Identical in pitch, identical in rhythmic  
5 duration, identical in metric placement,  
6 zero, and so, in fact, 17 out of, what,  
7 maybe 46, 47 notes. And what  
8 characterizes those 17 notes that do line  
9 up is merely a descending scale.

10 Q. What does the term "rhythmic  
11 value" mean to you, if anything?

12 A. Rhythmic value would be the  
13 rhythmic duration of a note: An eighth  
14 note, a quarter note, a 16th note.

15 Q. How many of those line up?

16 MS. LEPERA: Objection to form.

17 Q. How many of those line up  
18 between "Wiggle" and "Levitating," and  
19 separately -- well, let's start with that.

20 A. Sure.

21 MS. LEPERA: If you understand  
22 the question.

23 THE WITNESS: I do.

24 MS. LEPERA: Okay.

25 A. So we are going to disregard

1 pitch which is the fundamental element of  
2 melody, and we're going to disregard scale  
3 degree which tells us the function of  
4 those pitches. And we are only going to  
5 look at rhythmic duration and metric  
6 placement. That is the rhythmic values.

7 Q. Yes, please.

8 A. So I understand the question.

9 Q. Thank you.

10 A. All right. Thank you.

11 So do you recall how many --  
12 well, let me tell you the number in the  
13 first phrase that are the same in value.  
14 The first seven in "Levitating," then the  
15 next two not, then the next five in  
16 "Levitating" -- so that's 12 -- then the  
17 next two not, the next four at bar two,  
18 beat one are the same in rhythmic duration  
19 and metric placement. So that's -- did I  
20 say -- how many did I say?

21 THE WITNESS: Can you read the  
22 record? Forgive me.

23 (Whereupon, a portion of the  
24 record was read back.)

25 "ANSWER: Well, let me tell you

1 the number in the first phrase that  
2 are the same in value. The first  
3 seven in "Levitating," then the next  
4 two not, then the next five in  
5 "Levitating" -- so that's 12 -- then  
6 the next two not, the next four at bar  
7 two."

8 A. Okay. So 12 in the first bar,  
9 the first four notes in the second bar,  
10 the next two notes -- well, the note with  
11 the seven over it, it is the same rhythmic  
12 value; they're completely different  
13 pitches. So that was -- 12 plus 4 is 16.  
14 That's 17, 18. So out of those first --  
15 whatever we said -- 23, 24 notes, 18 have  
16 the same rhythmic duration, again,  
17 disregarding pitch, disregarding scale  
18 degree.

19 Q. Jumping to a melody question now  
20 on this, if I may: If you have a  
21 descending pattern and then follow it with  
22 some pickup notes, could the combination  
23 of the descending pattern with the pickup  
24 notes be considered original?

25 MS. LEPERA: Objection to form.



1           Objection to the preamble about  
2           turning to melody. And speculative.  
3           Out of context.

4           You can answer.

5           A.       There's no context for me to  
6           answer that question. If you'd like me to  
7           answer that question within the context of  
8           these transcriptions, I'd be also happy,  
9           as I did earlier in my testimony, to point  
10          to answers like this in the Salani and  
11          Calello transcriptions.

12          Q.       I'm asking you about your  
13          testimony. So for "Levitating," for  
14          argument's sake -- strike that.

15                  For "Levitating" which begins  
16          with the descending phrase and then has  
17          some pickup notes, at what point would you  
18          consider that to be original, if at all?

19                  MS. LEPERA: Objection to the  
20          form of the question.

21          A.       This is literally the same  
22          answer that I gave earlier -- much earlier  
23          in my testimony.

24                  The first 20 notes in  
25          "Levitating" which are not nearly

1 identical to the notes in "Wiggle" in  
2 those corresponding parts, beats -- those  
3 first 20 notes, five, five, five, five,  
4 four, four, four, four, three, three,  
5 three, three, two, two, two, two, one,  
6 one, one, one, whether major or minor, but  
7 the point is that what you have there is a  
8 musical building block by any standard of  
9 musicology, whether you want to call it  
10 commonplace, whether you want to call it a  
11 musical building block based on how the --  
12 how the chords have now adopted that term.  
13 And I want to be consonant with that  
14 understanding by the chords: It doesn't  
15 in any way abrogate the musicology; it's  
16 based on musicology. This is commonplace.

17 And so that portion, literally  
18 the first five beats, the first 20 notes  
19 in my transcription and, in fact, in the  
20 transcription which, as I recall, is same  
21 in Salani and Calello of "Levitating." So  
22 those first 20 notes are a musical  
23 building block. That would be filtered  
24 out.

25 Let's look now -- because your

1 question had to do with the upbeat or the  
2 pickup that follows it, but what you have  
3 left out is beats two and three of that  
4 first musical phrase. Let's look at them.  
5 We're looking at the second bar, once  
6 again, musical example 5B on page 32 of my  
7 affirmative report, and what we have after  
8 the first four 16th notes which are the  
9 last notes that are at issue -- that are  
10 part of this building block, what you have  
11 is A, A, 16th, 16th, B moving up and then  
12 A moving down; whereas, in "Levitating,"  
13 you have A, 8th note, not 16th note, not  
14 two of them but one, you have not a  
15 melodic contour of going up, you have the  
16 opposite. You're going down. So whereas  
17 "Wiggle" goes from six up to seven,  
18 "Levitating" goes from one down to seven.  
19 That's the difference. There's a  
20 difference not only in rhythm -- two 16ths  
21 is an 8th compared to two 8th -- but it's  
22 a difference also in melodic contour. One  
23 goes up and down. The other is opposite;  
24 it goes down and then up.

25 And so my point is -- and this

1 is consistent with my testimony --  
2 clearly, the first 20 notes going through  
3 bar two beat one, those first 20 notes are  
4 a musical building block. Let's just  
5 simply call them commonplace, and they had  
6 been commonplace. And so the point is  
7 that then what we have is a difference, a  
8 difference in beats two and three which  
9 I'm not going to be redundant and repeat.  
10 I've just articulated those differences.  
11 The only similarity is that single note A,  
12 different scale degrees, and I mentioned  
13 that in my earlier testimony.

14 Once you filter out from the  
15 first melodic phrase the musical building  
16 block, i.e., the commonplace elements that  
17 are in these two melodies, all you have  
18 left is A, a single note on beat three.

19 Now, let's continue with your  
20 question because your question is about  
21 the pickup notes, and as I state in at  
22 least the footnote -- and I think -- I  
23 would imagine that Calello and Salani  
24 would agree -- that those pickup notes are  
25 defined in Harvard, in Grove as notes that

1 are in front of a new melodic phrase. So  
2 if you look at the end of the staff on  
3 "Wiggle" in, again, musical example 5B, in  
4 the first staff, the top staff, you have  
5 five, five, five. That's part of the next  
6 musical phrase. That's why we call it a  
7 pickup. It's not part of the phrase that  
8 we just analyzed. And now notice, even in  
9 relative keys below it, you have a single  
10 note in "Levitating" which is the  
11 corresponding pickup. That's A.

12 So the answer to your question  
13 is that when you add in the notes that  
14 follow the 20 commonplace notes, you're  
15 beset, from your standpoint, with  
16 differences: Differences in beat two, a  
17 single note in beat three; and then a  
18 stark difference, three Gs on scale  
19 degree five as a pickup in "Wiggle" as  
20 compared with one pickup note on scale  
21 degree one. And even if you were to  
22 disregard scale degrees, three pickup  
23 notes on the pitch G in "Wiggle," but one  
24 pickup note on the pitch A in  
25 "Levitating." Those are starkly

1 different.

2 Q. Sticking with just "Levitating"  
3 here, the one, seven, one, one part -- you  
4 see that's the third -- part of the third  
5 bar?

6 A. The one, seven, one, one?

7 Q. On page 325B where, after the  
8 descending part, there's a one, seven,  
9 one, one.

10 A. Yeah. What you have to be very  
11 careful of, Counselor, is you just  
12 conflated two phrases. So one, seven, one  
13 in "Levitating" are the last three notes,  
14 as I explained, in the first melodic  
15 phrase. Those are the three notes that  
16 follow the descending commonplace scale.  
17 The A at the end of the staff, that is,  
18 the second one that you just recited, is  
19 part of the next musical phrase.

20 Q. So the end -- the one, seven,  
21 one, is that a building block?

22 MS. LEPERA: Objection to form.

23 A. I would have to look at this  
24 within the perspective of a -- of a  
25 complete analysis, but the point is this:

1 One, seven, one is a fragment. It would  
2 be below any sense of sufficient --  
3 sufficiently significant expression to be  
4 meaningful. And so one, seven, one at the  
5 end of a 23-note melodic phrase is just  
6 simply minimal. It's fragmentary. I  
7 don't know how else outside of that I  
8 would point to it, but whether or not I  
9 would call it a musical building block, it  
10 isn't the point --

11 Q. But it's my question.

12 A. Yeah. But the point is --

13 MS. LEPERA: Whoa, whoa, whoa,  
14 whoa. Time out. Start over. Let's  
15 ask a question.

16 Q. I apologize. I'm not trying to  
17 be rude. I'm just trying get answers to  
18 my questions.

19 A. Okay.

20 Q. So you don't know one way or the  
21 other whether one, seven, one would  
22 constitute a building block; yes or no?

23 MS. LEPERA: Objection to form.

24 Mischaracterizes. Misapprehends.

25 You can answer.

1           A.           What I'm saying is that if, for  
2           example, one, seven, one was the opening  
3           melodic phrase in a work at issue like  
4           Newton, three notes separated by a half  
5           step, if that were the case -- and that  
6           was what was at issue -- I would say that  
7           that is a commonplace and trite -- which  
8           is my testimony in that case, cited again  
9           by Judge Manela and the ninth circuit --  
10          it's commonplace and trite. If one wanted  
11          to call that a musical building block  
12          standing by itself, then one certainly  
13          might. I haven't done the research on  
14          that particular down and up.

15                   But point is: It's fragmentary  
16          and commonplace, and to the extent that  
17          commonplace is, again, what musicologists  
18          have used and now what courts are calling,  
19          in some cases, building block and what I  
20          believe other musicologists are now  
21          embracing, then one might find that those  
22          three notes are a musical building block.  
23          The point is that, by themselves, they are  
24          simply fragmentary and commonplace.

25                   Here, they are just simply a



1 fragment of an otherwise much longer  
2 melodic phrase.

3 Q. But at what point do fragmentary  
4 expressions that might just be building  
5 blocks become original?

6 MS. LEPERA: Objection to form.  
7 Incomprehensible question.

8 MR. BROWN: I think it's at the  
9 heart of the case here.

10 Q. Because I'm trying to understand  
11 your testimony -- I still don't.

12 At what point -- strike all my  
13 preamble.

14 MS. LEPERA: Yeah.

15 MR. BROWN: I apologize, but --

16 MS. LEPERA: It's okay. I'm  
17 trying -- let's get a question we all  
18 comprehend.

19 MR. BROWN: Thank you.

20 MS. LEPERA: Yeah.

21 Q. At what point do  
22 cobbled-together building blocks become  
23 something that's not a building block?

24 A. That's --

25 MS. LEPERA: Objection to form.

1 Speculative.

2 A. That's speculative. You're  
3 asking me to speculate without a score in  
4 front of me. What I have testified to  
5 here is that one, seven, one, at the end  
6 of a 23. That is, those last three  
7 notes -- at the end of a 23-note melodic  
8 phrase is fragmentary and unremarkable,  
9 and I have no doubt that I would be able  
10 to find -- given the fact that this is not  
11 even a standalone one, seven, one, but  
12 just simply part of a larger melodic  
13 phrase -- that I would be able to find  
14 countless works with melodies that have  
15 one, seven, one in them.

16 Q. And that's what I'm -- if you  
17 keep distilling a song into four notes,  
18 portions, isn't everything building  
19 blocks?

20 MS. LEPERA: It's been asked and  
21 answered this morning. And  
22 speculative.

23 A. It's not only speculative, it  
24 misrepresents my analysis. That is  
25 precisely not what I've done. I haven't

1 taken four notes; I've taken 20 notes,  
2 and I've shown that those 20 notes in "Don  
3 Diablo" -- which are closer than the notes  
4 in "Wiggle" as compared to "Levitating,"  
5 but not the same -- are identical in  
6 Czerny Opus 299, identical in rhythmic  
7 duration, identical in pitch, identical in  
8 scale degree, identical in melodic  
9 placement.

10 So the point is: You have a  
11 19th century work that is more similar,  
12 literally identical where there are  
13 differences even between Diablo and  
14 "Levitating." So I have not essentially  
15 fractionalized; I've taken that whole  
16 20 notes over a 23-note melodic phrase and  
17 said, once you take out those 20 notes,  
18 there's only one note in the next notes  
19 that lines up, and by any standard, by  
20 common sense, that one note is not  
21 significant.

22 Q. And what I'm saying is: If you  
23 keep filtering building block after  
24 building block, you have nothing left,  
25 right?

1 A. That misrepresents --

2 MS. LEPERA: Objection to form.

3 Q. I'm not saying about this song  
4 in general; I'm saying about the technique  
5 in general.

6 MS. LEPERA: Objection to form.

7 Misapprehends. Mischaracterizes.

8 You can answer.

9 A. It misrepresents the analysis  
10 that I, not only just recounted, but  
11 that's in my report because it's not  
12 building block after building block; it is  
13 one building block, a 20-note building  
14 block that's in Czerny and then in other  
15 prior art and, in some cases, more similar  
16 in that prior art than any similarity  
17 between even "Don Diablo" and  
18 "Levitating."

19 So what you have said  
20 mischaracterizes the analysis. It's not  
21 building block after building block, it is  
22 not a -- an infinite regress where you  
23 say, well, these three notes are no good  
24 and these three notes are no good. That's  
25 not what my analysis has done -- this is

1 not what my analysis has done, and this  
2 certainly misrepresents my testimony.

3 Q. I'm not trying to misrepresent  
4 your testimony. I'm trying to understand  
5 the technique. And I'll hit it one more  
6 time, one last question, and I'll move on.

7 So if you were then additionally  
8 filtering and said, let me look to see if  
9 one, seven, one is also a building block,  
10 how would you be left with anything  
11 original at the end of the day?

12 MS. LEPERA: Objection to form.  
13 Outside the context of the analysis  
14 with respect to the comparison.

15 A. It's quite misguided, the  
16 presumption -- or the assumption, if you  
17 will, in your question. Once again, I'm  
18 repeating testimony -- and forgive me --  
19 but those three notes, the first two of  
20 which are different from the corresponding  
21 notes in beat two of "Wiggle." So first  
22 of all, they're filtered out because  
23 they're different. That's part of the  
24 filtering process, not just to filter out  
25 notes that are in prior art and, in fact,

1 part of the musical building block, the  
2 first 20 notes which are clearly there,  
3 clearly shown in my report, but the next  
4 two notes that you continue to talk about,  
5 the next two of the three, are different.  
6 They're filtered out. All that you're  
7 left is one. That's the first part.

8 The second part is: As a result  
9 of that, these three notes are not even at  
10 issue. The only note that is at issue is  
11 the final note, A, and from common sense,  
12 A is something that is not a significant  
13 similarity. I have not suggested that  
14 one, seven, one is anything more than a  
15 fragment. That's it. But the point is:  
16 It's -- the first two notes are different  
17 and, therefore, don't require anything  
18 more than the filtering process.

19 Q. Going to drumming, page 21.

20 A. 21 is the drum legend?

21 Q. The drum legend.

22 A. Go ahead.

23 Q. This commonplace and basic --  
24 quote, this commonplace and basic rhythmic  
25 pattern --

1           A.           Oh, I'm sorry. Where are you?  
2           Oh, you're in the middle of paragraph 37.

3           Q.           -- was greatly popularized in  
4           disco music of the 1970s before the  
5           release of "Wiggle."

6                       Is it relevant at all that the  
7           creators of "Levitating" were trying to  
8           emulate a disco beat?

9                       MS. LEPERA: Objection to form.  
10          No foundation.

11          A.          Well, first, let's correct for  
12          the record the fact that what you left  
13          out -- you started with, this commonplace  
14          and basic rhythmic pattern was greatly  
15          popularized in disco music of the 1970s --  
16          indeed it was, no one can deny -- but what  
17          you left out is what I was talking about  
18          which is in the previous sentence, and  
19          that is that the only rhythmic similarity  
20          in the drumbeats and percussion rhythms in  
21          "Wiggle" and "Levitating" is four quarter  
22          beats per bar on the kick -- also called  
23          the bass -- drum termed a, quote, four on  
24          the floor, end quote, rhythm as seen in  
25          the lower portion of the staffs. You left

1       that out.

2                       So the point is, what I am  
3       saying is that: Four on the floor --  
4       which is dum, dum, dum, dum -- and every  
5       bar in quarter notes, this is something  
6       that was already well known, well used,  
7       commonplace in disco music before 1978,  
8       before 1979. Indeed, in "Stayin' Alive,"  
9       it's not just in the portion at issue, it  
10      is virtually throughout the entire song,  
11      four on the floor where the kick drum  
12      plays quarter notes in every bar on one,  
13      two, three, four.

14               Q.       What I'm asking: Is it an  
15      extrinsic factor that the creators --  
16      strike that.

17                       Is it an extrinsic factor that  
18      the "Levitating" authors try to emulate a  
19      disco sound -- is that something extrinsic  
20      that has no bearings on your analysis?

21                       MS. LEPERA: Objection to form.  
22               No foundation with respect to that  
23               contention.

24                       But you can answer.

25               A.       To the extent that the overall



1 style, in the broadest sense, of  
2 "Levitating" would be a kind of pop dance,  
3 and dance is a very, very broad category  
4 that can include, you know, early disco  
5 and dance music and so forth. To the  
6 extent that they did say that -- and I  
7 don't know that they said that -- to the  
8 extent that they said that, that would be  
9 consistent with a -- with the use, at  
10 times, of a four on the floor because  
11 that's -- you know, that is consistent  
12 with dance music.

13 So to the extent that they were  
14 in some way interested in that style,  
15 well, yes, but that is not even remotely  
16 probative of copying "Wiggle" or "Don  
17 Diablo" because the rest, as per the  
18 transcription which you haven't pointed to  
19 on the previous page which puts the  
20 percussion music and drums in "Wiggle"  
21 over that in "Levitating," shows  
22 unequivocally, objectively that they are  
23 vastly different, save for this four on  
24 the floor commonplace rhythm.

25 Q. How often is cowbell used in

1 instrumentation?

2 MS. LEPERA: Objection to form.

3 A. In the instrumentation of what?

4 Q. Pop music.

5 MS. LEPERA: Oh, not in the  
6 context of these songs, just in the  
7 world?

8 Q. In pop music in general?

9 A. I think it has to have been used  
10 in thousands of songs, cowbell.

11 Q. And is cowbell a common thing in  
12 these songs?

13 MS. LEPERA: Objection to form.

14 A. I don't understand the question.

15 Q. Is -- both "Don Diablo" and  
16 "Levitating" use a cowbell, correct?

17 A. Let's go to the explication of  
18 instrumentation so that we're absolutely  
19 clear --

20 Q. Let me withdraw the question  
21 because I want to try to get through  
22 everything we can in time, and when we hit  
23 that page, potentially --

24 The different tempos between 103  
25 and 106, if -- strike that.

1 I understand your argument that  
2 the phrase at issue is just building  
3 blocks. Assuming it wasn't building  
4 blocks and "Wiggle" and/or "Don Diablo"  
5 are considered original nonbuilding  
6 blocks, how significant is it that the  
7 beats per minute were 103 versus 106, if  
8 anything?

9 MS. LEPERA: Objection to form.

10 A. The difference in tempo is not  
11 significant.

12 Q. On page 26, I'm going to read a  
13 quote from your report. I want to read  
14 paragraph 56 -- and I want to be  
15 completely fair to you; I'm not trying to  
16 trick you by reading a portion of a  
17 sentence and then leaving out a preamble,  
18 but I do have a question. Did you have a  
19 chance to read paragraph 56?

20 A. I just perused it, yes.

21 Q. In the second sentence, I --  
22 quote, I found ample musicological support  
23 that "Levitating" was independently  
24 created.

25 I had asked you earlier about

1 originality, and now we'll go with  
2 independently created. Would it change  
3 your analysis at all if one of the alleged  
4 authors of "Levitating" admitted to  
5 directly copying from "Wiggle" and/or "Don  
6 Diablo"?

7 MS. LEPERA: I believe that was  
8 asked and answered as well.

9 But you can answer that again.

10 MR. BROWN: It wasn't because we  
11 used the term "originality" before.

12 MS. LEPERA: Well, he  
13 explained -- whatever. I'm not going  
14 to go.

15 You understand the question?

16 THE WITNESS: I do.

17 A. The key, for me, as a  
18 musicologist, is not on access or on  
19 statements that are purported or not by  
20 writers. This is very plain and clear.  
21 When you have so much prior art, when the  
22 content of the expression at issue is  
23 nothing more than a descending major scale  
24 in Plaintiff's work and minor scale in the  
25 Defendant's work, when it is that

1       simplistic, then to the extent that there  
2       is so much prior art widely available to  
3       the writers of both songs, that provides  
4       musicological evidence of that supports  
5       the finding that the writers of  
6       "Levitating" created "Levitating"  
7       independent of "Don Diablo" and simply use  
8       in what is at issue -- just essentially  
9       those 20 notes -- that those 20 notes were  
10      already commonplace and widely available  
11      to everyone.

12           Q.       But it wouldn't affect your  
13      actual report had you known that they  
14      admitted -- and I'm not saying they  
15      have -- but had you known that they  
16      admitted that they copied directly from  
17      "Don Diablo," you still would have used  
18      the word they "independently created it"?

19                   MS. LEPERA:   Objection to form.

20           A.       What I would say is that the --  
21      to the extent that the musicological  
22      evidence shows that what was available to  
23      the writers of "Wiggle" and "Don Diablo"  
24      and "Levitating" which was so widespread  
25      and, indeed, as I showed here -- and this

1 is just the tip of the iceberg -- any  
2 number of works post-"Don Diablo" but  
3 pre-"Levitating" that also use a  
4 descending scale and so forth and  
5 repetition of notes -- the point is that  
6 by the time you get to "Levitating," it's  
7 not just all of that 19th and 20th century  
8 prior art to "Wiggle" that's widely  
9 available to the writers of "Wiggle" and  
10 the writers of "Don Diablo," but you have  
11 now even more prior art prior to  
12 "Levitating" -- not prior to "Don Diablo,"  
13 as I stated in the report -- that makes it  
14 even more widely available to the writers  
15 of "Levitating." When you have that level  
16 of substance in prior art, when you have  
17 essentially a five, four, three, two, one  
18 descending scale -- which is a musical  
19 building block by any perspective -- then,  
20 indeed, it would be correct  
21 musicologically to say that the evidence  
22 points, given this wide availability, to  
23 independent creation.

24 Q. So you still would have kept the  
25 same language, is that a yes?

1           A.       I can't say because I haven't  
2       read your purported statement, how it was  
3       worded, what it referred to. Did they say  
4       anything very specific about the -- about  
5       any part of "Levitating"? This part of  
6       "Levitating" was copied from this part of  
7       "Don Diablo."

8                    You haven't given -- you've  
9       simply given me a speculation, and  
10      therefore, you're forcing me to answer  
11      speculatively, but it does not impact on  
12      the nature of the methodology that was  
13      used in this report which I have used for  
14      years, which is accepted. It's been  
15      accepted by courts which is accepted in  
16      musicology. So your speculation is simply  
17      beside the point and does not impact at  
18      all on the analysis in this report.

19           Q.       You then mention, in  
20      paragraph 57, the sole similarity at issue  
21      only occurs in portions of the verses.

22                    And what do you mean by that?

23           A.       Exactly what it says. As per  
24      the report, the similarities at issue in  
25      "Wiggle" and "Don Diablo" are in bars one

1 through four of the verses. There are  
2 two verses, and so you have essentially  
3 eight bars at issue.

4 In "Levitating" the -- instead  
5 of ten-bar verses -- which is the case in  
6 "Don Diablo" and "Wiggle" -- the verses in  
7 "Levitating" are eight bars. So the  
8 length of the verses is different. In  
9 "Levitating," the development of the  
10 melody, as I showed, that's at issue, the  
11 two-bar melody, is quite different. So in  
12 "Levitating," you have the first two bars  
13 which are then largely repeated in  
14 bars three and four. Then bars five and  
15 six are completely -- are quite  
16 different -- not completely, but quite  
17 different, and bars seven and eight are  
18 identical to bars one and two.

19 So the portion of the verses at  
20 issue -- and this is all in my report --  
21 the portions of the verses at issue in  
22 "Levitating" -- there are two verses --  
23 are bars one and two, three and four,  
24 seven and eight of an eight-bar verse.  
25 Once -- since that repeats, it's 12 bars



1 out of the total number of bars. That is  
2 what this points to. That essentially --  
3 and that's all, of course, explained that,  
4 essentially, it's bars one through four at  
5 issue in the verses, not bars five through  
6 ten; they're different. Bars one through  
7 four and seven and eight in the verses of  
8 "Levitating." That's what this refers to.

9 Q. Page 29, stylistic question for  
10 you. You, I think, underlined any melodic  
11 similarity in "Wiggle" and "Levitating" is  
12 insignificant and is a musical building  
13 block.

14 Just out of curiosity, why did  
15 you decide to underline that and put it by  
16 itself?

17 A. It's underlined because it's a  
18 subcategory -- it's a sub -- what is the  
19 right word?

20 MS. LEPERA: Heading?

21 THE WITNESS: A subheading.

22 Thank you.

23 A. It is a subheading. All of the  
24 subheadings throughout the report are  
25 underlined.

1 Q. Did -- strike that.

2 MR. BROWN: We can take a break.

3 MS. LEPERA: If the court  
4 reporter needs one, we definitely take  
5 one. They get priority on that.

6 THE VIDEOGRAPHER: Off the  
7 record. The time is 2:47 p.m.

8 (Whereupon, a recess was taken.)

9 THE VIDEOGRAPHER: Back on the  
10 record. The time is 3:08 p.m.

11 Q. Doctor, I remind you you're  
12 still under oath.

13 A. Thank you. Yes.

14 Q. Is there anything about the  
15 first two bars of "Levitating" that's not  
16 just a building block?

17 MS. LEPERA: Objection to form.  
18 Verse?

19 Q. At issue?

20 A. As per my report and my  
21 testimony, at least several times today,  
22 the first 20 notes of -- as I recall,  
23 23 notes are a musical building block. So  
24 the answer would be: The following three  
25 notes are not part of the musical building

1 block, the first two of which were  
2 filtered out, not because they are a  
3 building block, but because they were  
4 different from corresponding notes, in  
5 that case, I think, "Wiggle."

6 Q. For purposes of today's  
7 deposition, we furnished you with an  
8 official exhibit that's Plaintiff's  
9 Exhibit Number 1 that will be introduced  
10 it to the record. We're also furnishing  
11 you with a informal copy of that Exhibit 1  
12 so you can look at the different pages  
13 that you put where you had transcriptions  
14 and to make it easier. So just so we're  
15 all on the same page here about that.

16 And I think the first example  
17 that comes up in your report is the -- and  
18 forgive me if I can't pronounce it --  
19 "Contestación A La Casa En El Aire." And  
20 we look at page 38.

21 A. Can I just correct the record?  
22 It is not the first example in my report.  
23 It's probably the first example of prior  
24 art.

25 Q. That's what I'm referring, prior

1 art. Actually, let's go to page 40 for  
2 "Wiggle."

3 MS. LEPERA: Okay. So for the  
4 record, you're referring the witness  
5 to his musical example eight on  
6 page 40.

7 MR. BROWN: And 116 for "Don  
8 Diablo."

9 MS. LEPERA: And for the record,  
10 you're referring the witness to his  
11 musical example 44 on page 116; is  
12 that correct?

13 MR. BROWN: Correct.

14 MS. LEPERA: Okay.

15 A. Oh, it's interesting. You don't  
16 have red -- excuse me, Counselor.

17 MS. LEPERA: Oh, he doesn't have  
18 the color coding.

19 A. You don't have red color coding  
20 in this marked exhibit. You must have red  
21 color coding.

22 MS. LEPERA: Here's what we can  
23 do. I saw in review, and you can  
24 examine it on a break. Why don't we  
25 substitute my copy which I just gave

1 him which is what you said to be the  
2 informal copy which is color coded,  
3 and we can use this as the official  
4 Plaintiff's 1, and then he can just  
5 separate the major numbers out and  
6 just use this by itself and get rid of  
7 that, right? And maybe, if we need an  
8 extra copy, we can use it because you  
9 do want to see the color coding for  
10 both your musical examples. So if  
11 that's okay, let's just put the -- for  
12 now.

13 THE WITNESS: What I can do is  
14 stay with this one copy --

15 (Whereupon, simultaneous  
16 conversation took place disrupting the  
17 record, and the court reporter  
18 requested one person speak at a time  
19 without interruption from anyone  
20 else.)

21 MS. LEPERA: Yes. Yes. Because  
22 they're loose.

23 THE WITNESS: So tell me again.

24 MR. BROWN: Our 116, it wasn't  
25 color copied in the PDF.

1 MS. LEPERA: Well, there's a red  
2 in the 244 so -- you know, but that  
3 may be talking about the next page so  
4 I don't know --

5 THE WITNESS: I'm talking about  
6 the next page --

7 (Whereupon, simultaneous  
8 conversation took place disrupting the  
9 record, and the court reporter  
10 requested one person speak at a time  
11 without interruption from anyone  
12 else.)

13 THE WITNESS: -- musical --  
14 starting with musical example 45, you  
15 should have red color. The copy that  
16 I received as the -- as the official  
17 copy --

18 MS. LEPERA: Yeah, he doesn't  
19 have it.

20 THE WITNESS: Doesn't have it.

21 MR. BROWN: That's fine. I  
22 don't know how much this will impact,  
23 but.

24 MS. LEPERA: It's on the same  
25 song too. So that's why I mentioned

1 it. So starting just -- let's make  
2 sure the record is clear what we're  
3 looking at. We are looking at -- and  
4 we've substituted for the record now  
5 the copy -- loose copy of  
6 Dr. Ferrara's affirmative report that  
7 we made. I'll represent it's a true  
8 and accurate copy of his affirmative  
9 report with color coding. We are  
10 looking at musical example eight which  
11 is page 40 of his report, and we are  
12 looking at musical example 44, at  
13 minimum, page 116 of his affirmative  
14 report, yes?

15 MR. BROWN: Yes.

16 MS. LEPERA: Okay.

17 Q. And let's also agree when we  
18 talk about the works at issue you  
19 understand that to mean what, Doctor?

20 A. In the case of musical  
21 example eight, "Wiggle" and "Levitating."  
22 In the -- and that's on page 40. In the  
23 case of musical example 44 on page 116,  
24 "Don Diablo" and "Levitating."

25 Q. For "Contestación," the

1       turnaround has 16th notes descending one  
2       half step for five beats each?

3           A.       How are you using the term  
4       "turnaround"? You mean "pickup"?

5           Q.       Where we start from the -- from  
6       the part where those five, five, five,  
7       five.

8                   MS. LEPERA: Objection to form.  
9       When you say "where we start," there  
10      are three notes before that. Are you  
11      eliminating that.

12                  MR. BROWN: For purposes of  
13      discussion for now.

14                  MS. LEPERA: Okay.

15           A.       The only place that I see -- I'm  
16      looking at musical example eight. The  
17      only place where I see five, five, five  
18      are the last five notes of the first  
19      score -- the whole score is considered,  
20      you know, the three stoffs, okay? So that  
21      whole score, that would be the last three  
22      notes in "Wiggle" at the end of that staff  
23      which are the pickup to the next phrase in  
24      "Wiggle." Is that what you are referring  
25      to?



1 Q. No. I apologize. I'm referring  
2 to "Contestación."

3 A. So where do you see five, five,  
4 five, three of them only?

5 Q. Five, five, five, five, maybe  
6 four. I'm sorry. I apologize.

7 A. Okay. All right. So --

8 MS. LEPERA: Is there a  
9 question, though?

10 A. Is there a question? I was just  
11 going to ask about that five, five, five,  
12 five.

13 (Pause in proceedings.)

14 MS. LEPERA: While you're --  
15 whatever you're doing, I just have a  
16 quick question, and maybe for ease  
17 with the witness, unless you don't  
18 want it, there are two other musical  
19 examples regarding "Contestación" with  
20 respect to "Wiggle" and "Don Diablo"  
21 comparing to "Levitating" which is  
22 musical example 9 and musical example  
23 45 which have the red designations.  
24 Do you want him to, ease of reference,  
25 bring those out as well?

1 MR. BROWN: If he needs to. I  
2 don't think he needs to.

3 MS. LEPERA: Okay.

4 MR. BROWN: Thank you, though.

5 MS. LEPERA: It means you can.

6 Q. In "Contestación," does the  
7 placement of the final note of the musical  
8 phrase within a measure contribute to the  
9 originality?

10 MS. LEPERA: Objection to form.

11 A. It's not clear what you're  
12 talking about. What phrase? The first  
13 phrase? The second phrase?

14 Q. The phrase starting with -- the  
15 phrase starting with one, one, one, one.

16 MS. LEPERA: Objection to form.  
17 You can answer.

18 Well, maybe, can you repeat the  
19 question? Because I think we've lost  
20 the context. You want to try to read  
21 it back?

22 MR. BROWN: I will ask a  
23 different question.

24 MS. LEPERA: Okay.

25 Q. Do the 16th notes in the second

1 beat of the second bar of "Contestación"  
2 contain a melody that appears in  
3 "Levitating"?

4 MS. LEPERA: Objection to form.

5 Do you understand the question?

6 THE WITNESS: Somewhat. So I  
7 want to make sure that I do.

8 MS. LEPERA: You can ask for  
9 clarification.

10 A. So in terms of clarification,  
11 are you pointing to the four 16th notes  
12 with the scale degrees two, one, seven,  
13 one on beat two of "Contestación"?

14 Q. Yes.

15 A. And what is the question?

16 Q. Is that a melody that also  
17 appears in "Levitating"?

18 A. No. And neither does the  
19 corresponding melody on that beat in  
20 "Wiggle" occur in "Levitating," and of  
21 course, it's been -- that's why the first  
22 and the third notes that are in beats two  
23 and three in "Levitating" are canceled  
24 out.

25 Q. I understand what you're saying

1 with other parts of the case and you have  
2 your testimony, sir, but what I'm asking  
3 is a very particular question: Between  
4 this and "Wiggle"?

5 A. Okay. So let me answer it very,  
6 very precisely. In the -- I believe, the  
7 Salani report in the transcription of 4A,  
8 she puts a rectangle. She's actually  
9 quite correct. The first 20 notes in that  
10 red rectangle, she says, are at issue. I  
11 agree with that. And so the point is --  
12 and what is important in the assumption in  
13 your question is that the first 20 notes  
14 that precede beat two of "Contestación" on  
15 scale degrees two, one, seven, one are  
16 what's at issue, not only as far as I'm  
17 concerned, but as far as your expert,  
18 Salani. And so yes, of course, those four  
19 notes are not the same, but they're not at  
20 issue, neither are those notes in the  
21 corresponding melodies.

22 Q. I appreciate that, but that --  
23 as long as we answer the questions that I  
24 ask, I'd appreciate it moving forward. I  
25 understand what your testimony is. I

1 understand that's in the report. I  
2 understand what you think is at issue, but  
3 even though, respectfully, you don't think  
4 it's at issue, I'm still going to ask the  
5 question.

6 MS. LEPERA: Can I ask you:  
7 Maybe, are you trying to ask him this?  
8 Are you trying to ask him whether  
9 beat two -- beginning in beat two of  
10 "Contestación" and beat two of  
11 "Levitating" in the second measure  
12 from that point forward are the same?

13 MR. BROWN: I'm asking if  
14 they're different.

15 MS. LEPERA: Okay. Different or  
16 the same?

17 A. Yes, as "Wiggle" and  
18 "Levitating" are as well. Yes, of course.

19 Q. Are the notes between  
20 "Contestación" and "Levitating" different  
21 for the second beat of the second bar?

22 MS. LEPERA: Second part.

23 A. Second part, yes. And asked and  
24 answered. Two, one, seven, one as  
25 compared to one, seven, one is different.

1 They have the same melodic contour.  
2 That's important. It's not, you know,  
3 terribly significant, but the point is:  
4 It has the same contour as "Levitating."  
5 It goes from scale degree from -- it goes  
6 scale degree two down to one, back up to  
7 scale degree two. That's what happens in  
8 "Levitating." It goes down to seven and  
9 up to one; whereas, in "Wiggle," it's the  
10 opposite. But the point is: While there  
11 is similarity in the melodic contour on  
12 beat two and going into beat three of  
13 "Contestación" and "Levitating," they are  
14 not identical.

15 MS. LEPERA: I thought he said  
16 "part." Did you say "bar"?

17 MR. BROWN: I did say bar.

18 Q. Would that make you change your  
19 answer at all, if it's bar or part?

20 A. I'd have to hear the question  
21 again.

22 Q. Would the notes between  
23 "Contestación" and "Wiggle" be different  
24 from that point?

25 MS. LEPERA: Objection. Can you

1 just clarify, when you say "from that  
2 point," what you mean precisely.

3 Q. The second beat of the second  
4 bar of "Contestación."

5 A. They are different, yes.

6 Q. And what about for the  
7 comparator between "Contestación" and "Don  
8 Diablo"? Are they different?

9 A. The what?

10 Q. If you were comparing between  
11 "Contestación" and "Don Diablo" --

12 MS. LEPERA: So we're going to  
13 musical example 44 now?

14 MR. BROWN: Yes.

15 THE WITNESS: Thank you.

16 A. Okay.

17 MS. LEPERA: So the question is  
18 clear -- and, Jason, you're making --

19 MR. BROWN: I'll rephrase the  
20 question.

21 MS. LEPERA: Thank you.

22 Q. Do the 16th notes in the second  
23 beat of the second bar of "Contestación"  
24 contain the melody that appears in "Don  
25 Diablo"?

1           A.           The answer is -- we can make  
2           this much faster if you wish -- insofar as  
3           the notes on beats two and three are the  
4           same in "Wiggle" and "Don Diablo" -- once  
5           again, the notes on beats two and three of  
6           bar two are the same in "Don Diablo" and  
7           "Wiggle." All of the answers that I gave  
8           previously with respect to "Wiggle,"  
9           "Contestación" and "Levitating" fully  
10          obtain with respect to musical example 44  
11          on page 116, "Don Diablo."

12                   Does that help?

13          Q.           I appreciate the answer. Thank  
14          you.

15                   Does the musical phrase in the  
16          first two bars of "Levitating" end with a  
17          quarter note on bar two, beat three?

18                   MS. LEPERA: Okay. We have  
19          documents in front of us. What  
20          document are you referring to?

21                   MR. BROWN: Could refer to  
22          either.

23                   MS. LEPERA: Well, musical  
24          example eight to start or musical  
25          example 44? Which one do you prefer?



1 Q. Do eight.

2 A. Okay. Please repeat the  
3 question with respect to musical  
4 example eight on page 40.

5 Q. Does the musical phrase in the  
6 first two bars of "Levitating" end with a  
7 quarter note on bar two, beat three?

8 A. End on a quarter note in bar two  
9 on?

10 Q. Beat three.

11 A. Beat three, yes.

12 Q. Does the musical phrase in the  
13 first two bars of "Wiggle and Giggle" end  
14 with a quarter note on bar two, beat  
15 three?

16 A. Yes.

17 Q. Does the musical phrase in the  
18 first two bars of "Contestación" end with  
19 an eighth note on the end of bar two,  
20 beat three?

21 A. On the second half of beat three  
22 in bar two, yes.

23 Q. Did I ask about "Don Diablo"?  
24 Does the musical phrase -- if we go to the  
25 other exhibit, does the musical phrase in

1 the first two bars of "Don Diablo" end  
2 with a quarter note on bar two, beat  
3 three?

4 A. Yes.

5 Q. Let's move to "El Cafetal."

6 A. May I spell that? Shall I spell  
7 that --

8 Q. Yeah, sure.

9 A. -- for the record?

10 Q. Yes, please.

11 A. Cafetal, C-A-F-E-T-A-L.

12 Q. And that would be page 45 and  
13 120.

14 MS. LEPERA: Okay.

15 A. I have 45.

16 The second set for "Diablo"?

17 Q. 120.

18 A. 120.

19 Q. Does bar two from "El Cafetal"  
20 contain rhythmic differences from  
21 "Levitating?"

22 A. Yes.

23 Q. Does it contain rhythmic  
24 differences from "Wiggle and Giggle"?

25 A. Yes.

1 Q. Does it contain rhythmic  
2 differences from "Don Diablo"?

3 A. Yes. In all of those cases, the  
4 rhythmic differences begin on beat two of  
5 bar two, the first beat of which is part  
6 of the 20 notes that are at issue in  
7 "Levitating" and "El Cafetal."

8 Q. Would you say bar two of  
9 "El Cafetal" is unique?

10 A. In and of itself?

11 MS. LEPERA: Objection to form.

12 Q. In and of itself.

13 A. I haven't done an analysis of  
14 it. I can't say whether it's unique or  
15 not.

16 Q. Does "El" --

17 A. Let me just make sure that the  
18 answer is clear. I haven't done an  
19 analysis of that outside of the full  
20 phrase which is, you know, 20 -- one, two,  
21 three, four -- about 24 or 25 notes. But  
22 you've separated the last part, and I  
23 haven't done an analysis of that portion  
24 in and of itself.

25 Q. I'm going to ask to you move to

1 "Ging Gang Goolie" on page 71 and 144.

2 How many beats are there in the  
3 descending 16th -- I'm sorry. Do you need  
4 a second doctor?

5 A. I'm sorry. You said page 141?  
6 That's "Stayin' Alive."

7 Q. 144. 144.

8 MS. LEPERA: And 71.

9 Q. 71 and 144.

10 A. Okay.

11 Q. How many beats of descending  
12 16th notes are there in "Ging Gang  
13 Goolie"?

14 A. Four. A total of 16 descending  
15 notes and 16ths on scale degrees.

16 Q. How many beats are there in  
17 "Levitating"?

18 MS. LEPERA: How many beats are  
19 there in "Levitating"?

20 Q. How many beats are there in the  
21 first two bars of the comparison?

22 MS. LEPERA: How many beats in  
23 the first two bars?

24 A. I think what you mean is in the  
25 first phrase, excluding the pickup to the

1 next phrase, and that's what we've been  
2 discussing, 23.

3 Q. Are there five beats of  
4 distending 16ths?

5 A. Correct. Five beats of  
6 descending 16ths for a total of 20 notes  
7 descending on scale degrees five, four,  
8 three, two, one.

9 Q. And how about in "Don Diablo"?

10 A. In "Don Diablo," there are also  
11 five, but instead of starting on scale  
12 degree five, it starts on scale degree  
13 three. So it's three, two, one, seven,  
14 six.

15 Q. And what about "Wiggle"?

16 MS. LEPERA: When you say "what  
17 about 'Wiggle,'" can you be precise  
18 what your question is? Thank you.

19 MR. BROWN: Sure.

20 Q. How many beats are there in the  
21 first two bars of "Wiggle"?

22 MS. LEPERA: How many beats are  
23 there in the first few bars --

24 MR. BROWN: Two bars. Two bars.

25 MS. LEPERA: Two bars, or are

1           you asking him with respect to the  
2           16th notes?

3                   MR. BROWN: With respect to the  
4           16th notes.

5                   MS. LEPERA: Comparative to  
6           "Levitating."

7           A. As shown in my report, in  
8           "Wiggle," you don't have the steady  
9           decline. There's a real difference  
10          between "Wiggle" and "Levitating" in the  
11          descending scale and between "Wiggle" and,  
12          of course, "Don Diablo" so -- and you can  
13          see it right in the heart of your  
14          question. In "Don Diablo," three, three,  
15          three, three, two, two, two, two, one,  
16          one, one, one, seven, seven, seven, seven,  
17          six, six, six. By way of difference in  
18          "Wiggle," three, three, three, three, two,  
19          but then a change of direction back up to  
20          three, then down to two and then on scale  
21          degree one early. It is a syncopation so  
22          that one doesn't occur on beat three as it  
23          does in "Don Diablo," but it occurs on the  
24          last 16th of beat two. Then the next beat  
25          is tied over. It does not iterate it at

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1 all. Then you have one, one, one, one  
2 instead of seven, seven, seven, seven on  
3 beat four of "Don Diablo." You have  
4 seven, seven, seven with an 8th note in  
5 the third.

6 So the answer is that, as per my  
7 report, there are several differences in  
8 the descending notes between "Wiggle" and  
9 "Don Diablo" and, of course, between  
10 "Wiggle" and "Levitating."

11 Q. I'm going to ask to you to go to  
12 "Stayin' Alive," page 65 and 139.

13 A. So we're backing up?

14 Q. We're backing up. Thank you.

15 A. Okay.

16 Q. So we can dance.

17 MS. LEPERA: 139 and 65, musical  
18 examples 25 and 59, I assume?

19 MR. BROWN: Yes.

20 THE WITNESS: And the second  
21 set, I have 65 --

22 MS. LEPERA: 139.

23 THE WITNESS: 139. Thank you.

24 MS. LEPERA: Musical example 59.

25 THE WITNESS: Thank you.

1 A. Please go ahead.

2 Q. Does "Stayin' Alive" have a  
3 unique descending 16th-note melody that  
4 differs from "Levitating"?

5 MS. LEPERA: Objection to form.

6 A. First, I wouldn't call a  
7 descending melody necessarily distinct.  
8 There are differences between the  
9 descending melody in "Stayin' Alive" --  
10 obviously, the same scale degrees, also in  
11 a minor key like "Levitating" -- one of  
12 the -- you can call it a distinctive  
13 change -- is that the ninth note is tied  
14 over, and that also is the case in  
15 "Wiggle." The ninth note is tied over. I  
16 have a red arrow in musical example 25 on  
17 page 65, and that then occurs again at the  
18 end of bar one on scale degree two. So  
19 what we have is a descent from scale  
20 degrees five, four, three, two, but then a  
21 movement back up to scale degree three.

22 Q. Does it -- strike that.

23 Does "Stayin' Alive" have a  
24 unique descending 16th-note melody from  
25 "Don Diablo"?



1 MS. LEPERA: Objection to form.

2 A. Your characterization of  
3 "distinct" I'm not quite comfortable with.  
4 What I would say is that there are  
5 similarities and differences between the  
6 descending melody at issue, the opening of  
7 the chorus in "Stayin' Alive" and in "Don  
8 Diablo." There are similarities  
9 between -- and differences between the  
10 melody of the opening of "Stayin' Alive"  
11 that's at issue, the descending 16ths, and  
12 that in "Wiggle." So they all have --  
13 that is, "Wiggle" to Diablo -- there are  
14 differences. "Wiggle" to "Stayin' Alive,"  
15 in the descending 16ths, there are  
16 similarities and differences, and "Don  
17 Diablo" and "Stayin' Alive," similarities  
18 and differences in the descending part.

19 The point of my analysis is that  
20 the portion -- the part that is similar,  
21 the decent of repeating 16th notes on a  
22 scale, is a musical building block.

23 Q. What about the differences -- I  
24 don't know if you mentioned -- between  
25 "Wiggle" and "Stayin' Alive"?

1           A.           I did.    If you would read my  
2   answer, I did.

3           Q.           I'm not certain that you did  
4   because you just went through a whole  
5   different permutation, but I don't think  
6   you hit that permutation.

7                   MS. LEPERA:   He did.   He talked  
8   about the tie in the third beat.

9                   MR. BROWN:   I think that was to  
10   the similarity, but not the  
11   difference.

12          A.           Then let me give you a  
13   conclusionary answer so that it will all  
14   be scooped up in one.   I think this is  
15   consistent with what I said.

16                   There are similarities and  
17   differences in the descending scale with  
18   16th notes at issue in "Don Diablo" and  
19   "Stayin' Alive."   There are similarities  
20   and differences in the descending scales  
21   in "Wiggle" and "Stayin' Alive."   There  
22   are similarities and differences in the  
23   descending scale in "Stayin' Alive" in  
24   "Levitating."

25                   I think that pairs them all.

1 Q. Does the second bar of "Stayin'  
2 Alive" contain four 16th notes tied to an  
3 eighth note on beat two and then an  
4 eighth-note rest?

5 A. No.

6 Q. Does --

7 A. Beat two is a tied eighth note  
8 followed by an eighth rest.

9 Q. Do any of the three other works  
10 have that?

11 A. Three eighth notes -- three 16th  
12 notes tied wherein the third 16th is tied  
13 to an eighth, that's beat one. Yeah. I  
14 think you might be confused, and perhaps I  
15 can clarify your question. I think you  
16 might be talking about beat three in  
17 "Stayin' Alive" where there are four 16ths  
18 wherein the fourth one is tied over to an  
19 eighth followed by an eighth. Is that  
20 what you were referring to? Beat three  
21 rather than beat two for "Stayin' Alive"?

22 Q. What about with measure two?

23 A. That is measure two.

24 MR. BROWN: Can we take a quick  
25 five-minute break?

1 MS. LEPERA: Okay.

2 THE VIDEOGRAPHER: Off the  
3 record. The time is 3:41 p.m.

4 (Whereupon, an off-the-record  
5 discussion was held.)

6 THE VIDEOGRAPHER: Back on the  
7 record. The time is 4:45 p.m.

8 MS. LEPERA: Just for the  
9 record, we took your binder which had  
10 Plaintiff's Exhibit 1, Dr. Ferrara's  
11 affirmative report, and substituted it  
12 for a color copy, whole-punched in  
13 identical format to what you  
14 previously had. If you want to  
15 inspect it to double-check so that we  
16 are -- no confusion on the record,  
17 it's the same thing you intended to  
18 mark, okay?

19 MR. BROWN: And that was by  
20 agreement. Thank you.

21 MS. LEPERA: Yes. Thank you so  
22 much.

23 Q. Doctor, first of all, I thank  
24 you for your patience. Second of all, I  
25 remind you you're still under oath.

1 A. Yes, and thank you.

2 Q. Are you familiar with the name  
3 of the album that "Levitating" is on?

4 A. I was at one time. I don't know  
5 that I remember it right now, sitting  
6 here.

7 Q. The album was called Future  
8 Nostalgia, and I take it that that has no  
9 impact upon your opinion whatsoever, does  
10 it?

11 MS. LEPERA: Objection to form.

12 A. The title of the album does not  
13 impact on my musicological analysis.

14 Q. I'm going to hand you an article  
15 from Agora entitled "Dua Lipa combines  
16 past and modern pop on Future Nostalgia."

17 MS. LEPERA: Thank you.

18 Q. And feel free to read the whole  
19 article. It's not very lengthy.

20 MS. LEPERA: Do you want to mark  
21 this at all or --

22 MR. BROWN: Mark this  
23 Plaintiff's Exhibit 2 for purposes of  
24 today's deposition.

25 (Whereupon, Agora article "Dua

1 Lipa combines past and modern pop on  
2 Future Nostalgia" was marked as  
3 Plaintiff's Exhibit 2 for  
4 identification.)

5 A. Okay. I've just perused it,  
6 four pages.

7 Q. The gist of the article is, the  
8 artist -- and I'll quote from the  
9 article -- the artist says she took  
10 inspiration from the '70s to 2000s when  
11 making the album, and this is apparent  
12 throughout each song.

13 That's a quote. I take it that  
14 has no impact on your opinion one way or  
15 the other, Doctor; is that correct?

16 MS. LEPERA: Just let me make an  
17 objection for the record. This is a  
18 hearsay document. Obviously, there's  
19 no quotation here on the document  
20 which speaks for itself.

21 A. So first, I was going to mention  
22 that the article, a good portion of it,  
23 seems to talk about the lyrics -- which  
24 are not at issue -- and I didn't see --  
25 but I might have missed it because I

1     only perused it -- any reference to the  
2     melodies at issue in the verse. They do  
3     talk about the chorus, but let me finish  
4     out. And so within that, two things: The  
5     first is they mention -- in prior  
6     testimony, perhaps this morning, when we  
7     were talking about four on the floor which  
8     is a disco pattern. In fact, I mentioned  
9     that word in my report and showed that  
10    disco pattern named such in the Pain  
11    Student Drum Method book, and I said that  
12    that is consistent. You mentioned  
13    something like there was an influence of  
14    disco, something like that. And I said,  
15    if that is the case, if, indeed, Dua Lipa  
16    said that there was an influence or a  
17    nostalgia for '70s music, that that's  
18    consistent with a literally commonplace  
19    four on the floor. I also note that it  
20    doesn't say nostalgia for the '70s, stop;  
21    it says, according to the quote -- and I  
22    don't know that it is an accurate quote  
23    from Dua Lipa -- '70s to the 2000s.  
24    That's a lot of songs.

25             And so, no, I don't find this

1 particularly important. The point is my  
2 musicological analysis is that of the  
3 music and what is at issue including that  
4 four on the floor disco pattern is simply  
5 nothing that is significant.

6 Q. You could set that aside. We're  
7 going to hand you an exhibit that we will  
8 mark as Plaintiff's Exhibit 3 for purposes  
9 of today's deposition. It's an article  
10 entitled "Dua Lipa talks INXS writing  
11 credit on 'Break My Heart' that brought  
12 Nostalgia to the forefront."

13 MS. LEPERA: Thank you.

14 (Whereupon, NME article "Dua  
15 Lipa talks INXS writing credit on  
16 'Break My Heart' that brought  
17 Nostalgia to the forefront" was marked  
18 as Plaintiff's Exhibit 3 for  
19 identification.)

20 MS. LEPERA: It's just a  
21 three-page article by a Nick Riley.  
22 Unclear the source -- oh, nme.com,  
23 April 22nd, 2020.

24 You want him to read it or --

25 MR. BROWN: Yeah.



1 Q. If you could, please, take the  
2 time to read the article?

3 A. So this is apparently about a  
4 different song altogether, "Break My  
5 Heart," but from the Nostalgia album. Is  
6 that what's being represented here?

7 Q. Yes, Doctor. I have a question  
8 about that. During the allegedly creative  
9 process of composing the Future Nostalgia  
10 album, based upon this article, Dua Lipa  
11 had written something, and then after the  
12 fact, realized -- or that it sounded  
13 similar to an INXS song. Were you aware  
14 of that?

15 MS. LEPERA: Objection to form.

16 A. No, I was not.

17 Q. Now that you're aware of it,  
18 does it change your opinion in your  
19 reports at all?

20 MS. LEPERA: Same objection.

21 You can answer.

22 A. That's really quite strange as  
23 the question, as a musicologist, because  
24 you're talking about music in a completely  
25 different song. This is not about

1 "Levitating"; this is about the music in  
2 "Break My Heart." So I don't see how what  
3 she had to say about the expression in  
4 "Break My Heart" has to do with the  
5 musicological analysis of the expression  
6 in "Levitating."

7 Q. So the answer is: No, it  
8 wouldn't change your opinion at all?

9 A. This, what you just presented to  
10 me, was not for the reasons I've just  
11 given.

12 Q. Thank you.

13 MR. BROWN: No further  
14 questions.

15 MS. LEPERA: Okay. We're good.

16 MR. BROWN: Doctor, thank you  
17 very much. It's nice to meet you.

18 THE WITNESS: Thank you.

19 MS. LEPERA: I'm just going to  
20 ask him couple of just -- there were a  
21 couple of YouTube links in his report,  
22 one of which appeared to have  
23 disappeared and one of which may not  
24 have actually been there with respect  
25 to some of the prior art. We just

1           wanted him to put them on the record  
2           for his report as substitute YouTube  
3           links. That's all.

4           MR. BROWN: Can we get a copy of  
5           that, please?

6           MS. LEPERA: Yes. I was just  
7           going to have him look at it, and then  
8           we can mark it as --

9           THE WITNESS: I'll do the second  
10          first.

11          MS. LEPERA: As Ferrara 4 -- or  
12          as Exhibit 4, you're using.

13          A. So in the YouTube link for "Ging  
14          Gang Goolie," recently, in reviewing my  
15          report, I went to that YouTube site, and  
16          it was down. And so I found the identical  
17          performance of "Ging Gang Goolie" which, I  
18          say in my report, I used for my  
19          transcription, and that's what you have  
20          there. So that is the updated YouTube --  
21          exactly the same YouTube -- exactly the  
22          same performance and composition. It's  
23          just that now you can actually access it.

24                 If the court were to try to  
25          access what was in the report, it would

1 see that it's down, that it's no longer  
2 available, and so I brought this to the  
3 attention.

4 The second, in "Cafetal," I  
5 noticed that I didn't provide the YouTube  
6 that I used, and so I now add that here to  
7 this exhibit so that, to the extent you  
8 want to look at the YouTube performance  
9 that I used in my transcription analysis,  
10 it's there.

11 Q. So Plaintiff's Exhibit 4, these  
12 YouTube links supplants the YouTube links  
13 from your affirmative report?

14 A. As described a moment ago in my  
15 testimony.

16 MS. LEPERA: Yeah. And I think  
17 one is actually doesn't supplant but  
18 supplies, and the other one  
19 substitutes from the one that was  
20 taken down, if I'm getting that  
21 correctly.

22 MR. BROWN: Counsel, if you  
23 could forward this via email too so I  
24 could -- somebody --

25 MS. LEPERA: An email on what

1 this is, is that what you'd like?

2 MR. BROWN: Yeah. That way, we  
3 can click on the links.

4 MS. LEPERA: Yes. And could you  
5 just mark this as Exhibit 4 for us so  
6 it's part of the record?

7 (Whereupon, YouTube links were  
8 marked as Plaintiff's Exhibit 4 for  
9 identification.)

10 MS. LEPERA: Thank you.

11 MR. BROWN: Anything else,  
12 Counsel?

13 MS. LEPERA: And you'll send him  
14 the links?

15 THE WITNESS: Yes.

16 MS. LEPERA: Perfect.

17 MR. BROWN: No further  
18 questions.

19 MS. LEPERA: I think that's it.  
20 Yeah. Thank you so much.

21 MR. BROWN: Thank you.

22 MS. LEPERA: Okay. Great.

23 MR. BROWN: Off the record.

24 THE VIDEOGRAPHER: We are off  
25 the record at 4:56 p.m., EST. This

concludes today's testimony given by  
Professor Lawrence Ferrara. The total  
number of media units used is five and  
will be retained by Veritext.

1 I have read the foregoing transcript  
2 of my deposition, and find it to be  
3 true and accurate to the best of my  
4 knowledge and belief.

5  
6  
7 -----  
8 LAWRENCE FERRARA, Ph.D.  
9

10 Sworn and subscribed to before me,  
11 On this \_\_\_\_ day  
12 of \_\_\_\_\_ 2024.  
13  
14  
15

16 Notary \_\_\_\_\_

17 My Commission Expires \_\_\_\_\_  
18  
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January 30, 2024

## I N D E X

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LAWRENCE FERRARA, Ph.D.	MR. BROWN	6

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R E Q U E S T S

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CERTIFICATION

I, Garry J. Torres, a Notary Public  
for and within the State of New York, do  
hereby certify:

That, Lawrence Ferrara, Ph.D., the  
Expert witness whose testimony as herein  
set forth, was duly sworn by me; and that  
the within transcript is a true record of  
the testimony given by said witness.

I further certify that I am not  
related to any of the parties to this  
action by blood or marriage, and that I am  
in no way interested in the outcome of  
this matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand this 13th day of February,  
2024.



GARRY J. TORRES

\* \* \*

signature requested

ERRATA SHEET  
VERITEXT/NEW YORK REPORTING, LLC

CASE NAME: LARBALL PUBLISHING COMPANY,  
INC. and SANDY LINZER PRODUCTIONS, INC.  
-v- DUA LIPA, CLARENCE COFFEE JR., et al.  
DATE OF DEPOSITION: January 30, 2024  
WITNESS' NAME: LAWRENCE FERRARA, Ph.D.

[illegible]

LAWRENCE FERRARA, Ph.D.

SUBSCRIBED AND SWORN TO  
BEFORE ME THIS \_\_\_\_\_ DAY  
OF \_\_\_\_\_, 2024.

NOTARY PUBLIC  
MY COMMISSION EXPIRES \_\_\_\_\_

CHRISTINE LEPERA, ESQ.

ctl@msk.com

February 15, 2024

RE: Larball Publishing Company, Inc. v. Dua Lipa

January 30, 2024, Lawrence Ferrara, Ph.D., 6409897

The above-referenced transcript has been

completed by Veritext Legal Solutions and

review of the transcript is being handled as follows:

\_\_\_ Per CA State Code (CCP 2025.520 (a)-(e)) - Contact Veritext  
to schedule a time to review the original transcript at  
a Veritext office.

\_\_\_ Per CA State Code (CCP 2025.520 (a)-(e)) - Locked .PDF  
Transcript - The witness should review the transcript and  
make any necessary corrections on the errata pages included  
below, notating the page and line number of the corrections.  
The witness should then sign and date the errata and penalty  
of perjury pages and return the completed pages to all  
appearing counsel within the period of time determined at  
the deposition or provided by the Code of Civil Procedure.

\_\_\_ Waiving the CA Code of Civil Procedure per Stipulation of  
Counsel - Original transcript to be released for signature  
as determined at the deposition.

\_\_\_ Signature Waived - Reading & Signature was waived at the  
time of the deposition.

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1     \_X\_ Federal R&S Requested (FRCP 30(e)(1)(B)) - Locked .PDF

2           Transcript - The witness should review the transcript and  
3           make any necessary corrections on the errata pages included  
4           below, notating the page and line number of the corrections.  
5           The witness should then sign and date the errata and penalty  
6           of perjury pages and return the completed pages to all  
7           appearing counsel within the period of time determined at  
8           the deposition or provided by the Federal Rules.

9     \_\_\_ Federal R&S Not Requested - Reading & Signature was not  
10           requested before the completion of the deposition.

1 Larball Publishing Company, Inc. v. Dua Lipa  
2 Lawrence Ferrara, Ph.D. (#6409897)  
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24 Lawrence Ferrara, Ph.D. Date  
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[clarify - composers]

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted

fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

Veritext Legal Solutions complies with all federal and State regulations with respect to the provision of court reporting services, and maintains its neutrality and independence regardless of relationship or the financial outcome of any litigation. Veritext requires adherence to the foregoing professional and ethical standards from all of its subcontractors in their independent contractor agreements.

Inquiries about Veritext Legal Solutions' confidentiality and security policies and practices should be directed to Veritext's Client Services Associates indicated on the cover of this document or at [www.veritext.com](http://www.veritext.com).